United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 747

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, APPELLANT,

vs.

RICHARD F. COOPER, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

FILED SEPTEMBER 21, 1932.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

Pleas and Proceedings before The Honorable T. Blake Kennedy, Judge of the United States District Court for the District of Wyoming, presiding in the following-entitled cause:

RICHARD F. COOPER, Plaintiff,

Law vs. No. 2062

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, Defendant.

Be it remembered, that heretofore, and on, to-wit,
1 the 15th day of January, A. D. 1931, came Richard F. Cooper, Plaintiff, by Corthell, McCullough and Corthell, his attorneys, and filed in said Court a petition against Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant.

The said petiton is in words and figures, as follows, to-wit:

Petition.

I.

First Cause of Action.

For a first cause of action against the defendant,
2 the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the 14th day of March, 1924, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming his return of taxable income for the calendar year 1923. The lawful tax upon said return was $1,364.48, which amount was paid by the plaintiff to the defendant in full.

2. In said return the plaintiff included the sum of $18,475.79 as income from fiduciaries, being the distributive share accruing to and received as income by the plaintiff from

C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the Will of A. F. T. Cooper, deceased.

3. The right and interest of the plaintiff with respect to which the said distributive share accrued to the plaintiff was derived under the following provisions of said Will and the Codicil thereto, to-wit:

(Extract from original Will of A. F. T. Cooper:)

"14. I give, devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell, call in, collect and convert into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but
3 as to reversionary property not until it falls into possession, unless it shall appear to my trustees that an earlier sale shall be beneficial), and so that they shall have the fullest power and discretion to postpone the sale, calling in, and conversion of the whole or any part or parts of the said premises during such period as they shall think proper, and to retain the same or any part thereof in its present form of investment without being responsible for loss, and shall out of the moneys to arise from such calling in or conversion, pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this will or any codicil hereto, and make provision for the duty on any legacies or annuities bequeathed free of duty, and shall hold the residue of such moneys after payment of legacy duty thereon—"

(Extract from Codicil of provision superseding residue of said paragraph 14 of original Will:)

"Upon trust as to the first twenty one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper, the sum of seven thousand pounds to my son John Hartshorn Cooper, and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon

my Culland Hall estate, and as to the residue (if any) thereof, upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely, and as to one-fourth part or share for my said son John Hartshorn Cooper absolutely, and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper, but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said Will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1923 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1923, consisting of royalties under the said lease and interest on funds in their hands, in the manner following, to-wit: the receipts accruing prior
4 to September 13, 1923, in the proportions of one-half to the plaintiff, one-fourth to the administrator of the estate of said John Hartshorn Cooper (deceased in 1921), and one-fourth to Barbara V. Cooper, or to her use; and the receipts accruing on and after September 13, 1923, in the proportions of one-half to the plaintiff in his own right, one-eighth to the plaintiff as devisee under the Will of John Hartshorn Cooper (deceased in 1921), and the remaining three-eights to Barbara Violet Cooper, named in said Will and codicil, or to her use.

5. The said trustees in March, 1924, made and filed with

the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $908.08 derived from interest on funds in the hands of the trustees, and gross receipts of $87,240.39 accruing in 1923 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $43,608.67, and taxes and expenses amounting to $7,891.55, leaving as income, of the amount accruing as aforesaid from royalties, $35,740.17, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $36,648.25, from which the said amount of $18,475.79 returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1923 in the sum of $4,037.84. Such determination and assessment was based wholly on the disallowance by the commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaintiff's return of the sum of $24,676.14, representing such proportion of the deductions for depletion on the fiduciary return as was applicable to the plaintiff's distributive share aforesaid. Such disallowance of depletion and addition to income were made under the asserted claim of the commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1923.

7. Thereafter, to-wit, on the 29th day of December, 1928, the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon amounting to $1,059.93, making a total of $5,097.77, and threatened to enforce such payment by distress upon plaintiff's property, whereupon, under compulsion and protest and involuntarily and to prevent such distress, the plaintiff, on December 29, 1928, paid to the defendant the said sum of $5,097.77.

8. The plaintiff alleges that the disallowance of said deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining his net income; and that the additional tax determined and assessed against the plaintiff, based on the disallowance of such deduction, was unauthorized and unlawful. The plaintiff, therefore, alleges that on, to-wit, the 29th day of December, 1928, the defendant, in manner aforesaid, became and was indebted to the plaintiff for moneys then had and received by the defendant from the plaintiff, to the use of the plaintiff, in the said sum of $5,097.77, which said sum was then and there due and payable from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on September 14, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $5,097.77, with interest thereon, upon the grounds aforesaid, and demanded payment thereof, and, thereafter, to-wit, on the 14th day of October, 1930, such application and demand were refused.

II.

Second Cause of Action.

And, for a second cause of action against the defendant, the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the ..... day of March, 1925, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming his return of taxable income for the calendar year 1924. The lawful tax upon said return was $2,263.57, which amount was paid by the plaintiff to the defendant in full. Subsequently, the sum of $34.60 was erroneously refunded to the plaintiff.

2. In said return the plaintiff included the sum of $24,584.20 as income from fiduciaries, being the distributive share accruing to and received as income by the plaintiff from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the Will of A. F. T. Cooper, deceased.

3. The plaintiff adopts by reference the allegation set

forth in paragraph 3 of the first cause of action herein, with like effect as though the same were herein repeated at length.

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said Will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1924 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1924, consisting of royalties under the said lease and interest on funds in their hands, in the proportions of one-half to the plaintiff in his own right, one-eighth to the plaintiff as devisee under the Will of John Hartshorn Cooper (deceased in 1921), and the remaining three-eighths to Barbara Violet Cooper, named in said Will and codicil, or to her use.

5. The said trustees in March, 1925, made and filed
7 with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $567.58 derived from interest on funds in the hands of the trustees, and gross receipts of $82,628.89 accruing in 1924 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $38,957.78 and taxes and expenses amounting to $3,611.20, leaving as income, of the amount accruing as aforesaid from royalties, $40,059.91, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $40,627.49, from which the said amount of $24,584.20 returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1924 in the sum

of $4,113.30, to which was added the said erroneous refund of $34.60, making a total of $4,147.90. Such determination and assessment was based wholly on the disallowance by the commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaiintiff's return of the sum of $24,-348.62, representing such proportion of the deductions for depletion on the fiduciary return as was applicable to the plaintiff's distributive share aforesaid. Such disallowance of depletion and addition to income were made under the asserted claim of the commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1924.

7. Thereafter, to-wit, on the 29th day of December, 1928, the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon amounting to $839.95, making a total of $4,987.85, and threatened to enforce such payment by distress upon plaintiff's prop-
8 erty, whereupon; under compulsion and protest and involuntarily and to prevent such distress, the plaintiff on December 29, 1928, paid to the defendant the said sum of $4,987.85.

8. The plaintiff alleges that the disallowance of such deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining his net income; and that the additional tax determined and assessed against the plaintiff, based on the disallowance of such deduction, was unauthorized and unlawful. The plaintiff, therefore, alleges that on, to-wit, the 29th day of December, 1928, the defendant, in manner aforesaid, became and was indebted to the plaintiff for moneys then had and received by the defendant from the plaintiff, to the use of the plaintniff, in the said sum of $4,987.85, which said sum was then and there due and pay-

able from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on September 14, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $4,987.85, with interest thereon, upon the grounds aforesaid, and demanded payment thereof, and, thereafter, to-wit, on the 14th day of October, 1930, such application and demand were refused.

III.

Third Cause of Action.

And, for a third cause of action against the defendant, the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the 26th day of August, 1926, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming, his return of taxable income for the calendar year 1925. The lawful tax upon said return was $6,321.71, which amount was paid by the plaintiff to the defendant in full.

2. In said return the plaintiff included the sum of $38,354.31 as income from fiduciaries, being the distributive shares accruing to and received as income by the plaintiff from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees,
9 under the Will of A. F. T. Cooper, deceased.

3. The plaintiff adopts by reference the allegations set forth in paragraph 3 of the first cause of action herein, with like effect as though the same were herein repeated at length.

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities

bequeathed by said Will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1925 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1925, consisting of royalties under the said lease and interest on funds in their hands, in the proportions of one-half to the plaintiff in his own right, one-eighth to the plaintiff as devisee under the Will of John Hartshorn Cooper (deceased in 1921), and the remaining three-eighths to Barbara Violet Cooper, named in said Will and codicil, or to her use.

5. The said trustees in March, 1926, made and filed with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $424.26 derived from interest on funds in the hands of the trustees, and gross receipts of $102,016.69 accruing in 1925 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $34,759.43 and taxes and expenses amounting to $6,314.62, leaving as income, of the amount accruing as aforesaid from royalties, $60,942.64, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $61,366.90, from which the said amount of $38,354.31 returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1925 in the sum of $4,747.88. Such determination and assessment was based wholly on the disallowance by the commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaintiff's return of the sum of $21,724.65, representing such proportion of the deductions for depletion on the fiduciary return as was applicable to the plaintiff's distributive share aforesaid. Such disallowance of depletion and addition to income were made under the asserted claim of the commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said commissioner, under the law and regulations applicable thereto, depletion of the capital

value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1925.

7. Thereafter, to-wit, on the 29th day of December, 1928, the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon amounting to $783.40, making a total of $5,531.28, and threatened to enforce such payment by distress upon plaintiff's property, whereupon, under compulsion and protest and involuntarily and to prevent such distress, the plaintiff, on December 29, 1928, paid to the defendant the said sum of $5,531.28.

8. The plaintiff alleges that the disallowance of such deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining his net income; and that the additional tax determined and assessed against the plaintiff, based on the disallowance of such deduction, was un-
11 authorized and unlawful. The plaintiff, therefore, alleges that on, to-wit, the 29th day of December, 1928, the defendant, in manner aforesaid, became and was indebted to the plaintiff for moneys then had and received by the defendant from the plaintiff, to the use of the plaintiff, in the said sum of $5,531.28, which said sum was then and there due and payable from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on September 14, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $5,531.28, with interest thereon, upon the grounds aforesaid, and demanded payment thereof; and, thereafter, towit, on the 14th day of October, 1930, such application and demand were refused.

IV.

Fourth Cause of Action.

And, for a fourth cause of action against the defendant, the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the 14th day of April, 1927, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming his return of taxable in-

come for the calendar year 1926. The lawful tax upon said return was $1,518.43, which amount was paid by the plaintiff to the defendant in full.

2. In said return the plaintiff included the sum of $57,-869.34 as income from fiduciaries, being the distributive share accruing to and received as income by the plaintiff from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the Will of A. F. T. Cooper, deceased.

3. The plaintiff adopts by reference the allegations set forth in paragraph 3 of the first cause of action herein, with like effect as though the same were herein repeated at length.

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter.
12 The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said Will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1926 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1926, consisting of royalties under the said lease and interest on funds in their hands, in the proportions of one-half to the plaintiff in his own right, one-eighth to the plaintiff as devisee under the Will of John Hartshorn Cooper (deceased in 1921), and the remaining three-eighths to Barbara Violet Cooper, named in said Will and codicil, or to her use.

5. The said trustees in March, 1927, made and filed with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $767.98 derived from interest on funds in the hands of the trustees, and gross receipts of $134,719.81 accruing in 1926 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $38,296.04 and taxes

and expenses amounting to $4,600.81, leaving as income, of the amount accruing as aforesaid from royalties, $91,822.96, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $92,590.94, from which the said amount of $57,869.34 returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1926 in the sum of $3,595.67. Such determination and assessment was based wholly on the disallowance by the commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaintiff's return of the sum of $23,935.02 repre-
13 senting such proportion of the deductions for depletion on the fiduciary return as was applicable to the plaintiff's distributive share aforesaid. Such disallowance of depletion and addition to income were made under the asserted claim of the commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1926.

7. Thereafter, to-wit, on the 29th day of December, 1928, the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon amounting to $377.55, making a total of $3,973.22, and threatened to enforce such payment by distress upon plaintiff's property, whereupon, under compulsion and protest and involuntarily and to prevent such distress, the plaintiff, on December 29, 1928, paid to the defendant the said sum of $3,973.22.

8. The plaintiff alleges that the disallowance of such deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining his net income; and that the additional tax determined and assessed against the plaintiff, based on the disallowance of such deduction, was unauthorized and

unlawful. The plaintiff, therefore, alleges that on, to-wit, the 29th day of December, 1928, the defendant, in manner aforesaid, became and was indebted to the plaintiff for moneys then had and received by the defendant from the plaintiff, to the use of the plaintiff, in the said sum of $3,973.22, which said sum was then and there due and payable from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on September 14, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $3,973.22, with interest thereon, upon the grounds aforesaid, and demanded payment thereof, and, thereafter, to-
14 wit, on the 14th day of October, 1930, such application and demand were refused.

V.

Fifth Cause of Action.

And, for a fifth cause of action against the defendant, the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the ..... day of ....., 1928, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming his return of taxable income for the calendar year 1927. The tax indicated upon said return was $29,344.20, which amount was, on and before December 15, 1928, paid by the plaintiff to the defendant in full. Thereafter, to-wit, on November 29, 1929, the commissioner determined that there was an overstatement of income, in the matter of profit on sales, on said return in the sum of $1,789.15, by reason of which the plaintiff was entitled to a reduction of such tax in the sum of $438.15.

2. In said return the plaintiff included the sum of $34,010.99 as income from fiduciaries, being the distributive share accruing to and received as income by the plaintiff from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the Will of A. F. T. Cooper, deceased.

3. The plaintiff adopts by reference the allegations set forth in paragraph 3 of the first cause of action herein, with like effect as though the same were herein repeated at length.

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said Will, and had discharged the directions of the codicil as to "the first twenty-one
15 thousand pounds" therein mentioned, so that during the entire year 1927 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1927, consisting of royalties under the said lease and interest on funds in their hands, in the proportions of one-half to the plaintiff in his own right, one-eighth to the plaintiff as devisee under the Will of John Hartshorn Cooper (deceased in 1921), and the remaining three-eighths to Barbara Violet Cooper, named in said Will and codicil, or to her use.

5. The said trustees in March, 1928, made and filed with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $380.35 derived from interest on funds in the hands of the trustees, and gross receipts of $99,121.65 accruing in 1927 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $39,789.46 and taxes and expenses amounting to $5,295.00, leaving as income, of the amount accruing as aforesaid from royalties, $54,037.19, which, together with the amount accruing, as aforesaid, from interest aggregated net income of $54,417.54, from which the said amount of $34,010.99 returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on November 29, 1929, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1927 in the sum of $6,465.27, after deducting the said sum of $438.15 overpayment, as aforesaid. Such determination and assessment

in the gross sum of $6,903.42 was based wholly on the disallowance by the commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaintiff's return of the sum of $24,868.38 representing such proportion of the deductions for depletion on the fiduciary return as was applicable to the plaintiff's distributive share aforesaid. Such disallowance of depletion and addition to income were made under the asserted claim of the commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said commissioner, under
16 the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1927.

7. Thereafter, to-wit, on the 13th day of February, 1930, the defendant demanded payment by the plaintiff of such additional tax in the sum of $6,465.27, and threatened to enforce such payment by distress upon plaintiff's property, whereupon, under compulsion and protest and involuntarily and to prevent such distress, the plaintiff, on February 13, 1930, paid to the defendant the said sum of $6,465.27.

8. The plaintiff alleges that the disallowance of such deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining his net income; and that the additional tax determined and assessed against the plaintiff, based on the disallowance of such deduction, was unauthorized and unlawful. The plaintiff, therefore, alleges that on, to-wit, the 15th day of December, 1928, the defendant, in manner aforesaid, became and was indebted to the plaintiff in the sum of $438.15; and on, to-wit, the 13th day of February, 1930, in the said sum of $6,465.27, all for moneys on such respective dates had and received by the defendant from the plaintiff, to the use of the plaintiff, in the said sums of $438.15 and $6,465.27, respectively, which said sums were, on said respective dates, due and payable from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on February 14th, 1930, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $438.15 overpayment, and the said sum of $6,465.27 additional tax, with interest thereon, upon the grounds aforesaid, and demanded payment thereof. Plaintiff further alleges that more than six months has elapsed since the making and filing of said application.

Wherefore the plaintiff prays judgment against the defendant for the recovery, upon the first cause of action, of
the sum of $5,097.77, with interest thereon from De-
17 cember 29, 1928; and upon the second cause of action,
of the sum of $4,987.85, together with interest thereon from December 29, 1928; and upon the third cause of action, of the sum of $5,531.28, together with interest thereon from December 29, 1928; and upon the fourth cause of action, of the sum of $3,973.22, together with interest thereon from December 29, 1928; and upon the fifth cause of action, of the sum of $438.15, together with interest thereon from December 15, 1928, and the further sum of $6,465.27, together with interest thereon from February 13, 1928—all at the rate of seven (7%) per cent per annum; and for costs, and all other proper relief.

CORTHELL, McCOLLOUGH & CORTHELL,
Plaintiff's Attorneys.

State of Wyoming, County of Albany—ss.

I, N. E. Corthell, being first duly sworn, say I am one of the attorneys for the plaintiff in the above entitled action. I have read the foregoing petition and knows the contents thereof and I believe the facts therein stated to be true.

N. E. CORTHELL.

Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1931. (Seal) H. A. Baumbach, Notary Public.

Answer.

Filed March 30, 1931.

Now comes Marshall S. Reynolds, the defendant,
18 by Albert D. Walton, United States Attorney for the District of Wyoming, and files this his answer to the petition heretofore filed by this plaintiff.

1. Defendant denies the allegations in paragraph 1 of the first cause of action set forth in the petition. Defendant, however, alleges that the plaintiff filed a completed federal income tax return on May 12, 1924, for the calendar year 1923; and that the plaintiff paid to the Collector of Internal Revenue for the District of Wyoming on August 16, 1923, the sum of $1,365.23 and on October 2, 1923, the sum of $819.14.

2. Defendant admits the allegations in paragraph 2 of the second cause of action set forth in the petition that in the return filed, the plaintiff included the sum of $18,475.79, as income from fiduciaries. All other allegations in said paragraph, the defendant denies.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the first cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the first cause of action set forth in the petition and demands strict proof of each and every
19 allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the first cause of action set forth in the petition.

6. Defendant admits the allegations in paragraph 6 of the first cause of action set forth in said petition that on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1923 in the sum of $4,037.84, and that such determination and assessment was based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived and the addition to the net income shown by the plaintiff's return

of the sum of $24,676.14. Defendant, however, denies each and every other allegation in said paragraph 6 of the first cause of action in the petition.

7. Defendant admits the allegations in paragraph 7 of the first cause of action set forth in the petition that the defendant demanded payment by the plaintiff of such additional tax together with interest thereon amounting to $1,059.93, making a total of $5,097.77; and that the plaintiff on December 29, 1928, paid to the defendant the said sum of $5,097.77. Defendant, however, denies each and every other allegation in said paragraph 7 of the first cause of action of the petition.

8. Defendant denies the allegations in paragraph 8 of the first cause of action set forth in the petition.

9. Defendant admits the allegations in paragraph 9 of the first cause of action set forth in the petition.

In answer to the second cause of action set forth in plaintiff's petition:

1. Defendant admits the allegations in paragraph 1 of the second cause of action set forth in the petition with the exception of the allegation that the lawful tax upon said return was $2,263.57, which allegation defendant denies.

2. Defendant admits the allegation in paragraph 2 of the second cause of action set forth in the petition that in the said return the plaintiff included the sum of $24,584.20
20 as income from fiduciaries. Defendant, however, denies all other allegations in said paragraph 2.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the second cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the second cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the second cause of action set forth in the petition.

6. Defendant admits the allegations in paragraph 6 of

the second cause of action set forth in the petition that on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1924 in the sum of $4,113.30, to which was added the said erroneous refund of $34.60, making a total of $4,147.90. Defendant, however, denies each and every other allegation in said paragraph 6 of the second cause of action in the petition.

7. Defendant admits the allegations in paragraph 7 of the second cause of action set forth in the petition that the defendant demanded payment by the plaintiff of the additional tax, together with interest thereon amounting to $839.95, making a total of $4,987.85; and that the plaintiff on December 29, 1928, paid to the defendant the said sum of $4,987.85. Defendant, however, denies all other allegations in said paragraph 7 of the first cause of action in the petition.

8. Defendant denies the allegations in paragraph 8 of the second cause of action set forth in the petition.

9. Defendant admits the allegations in paragraph 9 of the second cause of action set forth in the petition.

In answer to the third cause of action set forth in the petition:

1. Defendant admits the allegations in paragraph 1
21 of the third cause of action set forth in the petition with the exception of the allegation that the lawful tax upon said return was $6,321.71, which allegation defendant denies.

2. Defendant admits the allegations in paragraph 2 of the third cause of action set forth in the petition that in said return the plaintiff included the sum of $38,354.31 as income from fiduciaries. Defendant, however, denies all other allegations in said paragraph 2.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the third cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the third cause of action set forth in the

petition and demands strict proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the third cause of action set forth in the petition.

6. Defendant admits the allegations in paragraph 6 of the third cause of action set forth in the petition that on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1925 in the sum of $4,747.88; and that such determination and assessment was based wholly on the disallowance by the commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaintiff's return of the sum of $21,724.65. Defendant, however, denies each and every other allegation in said paragraph 6 of the third cause of action in the petition.

7. Defendant admits the allegations in paragraph 7 of the third cause of action set forth in the petition that the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon amounting to $783.40, making a total of $5,531.28; and that the plaintiff on December 29, 1928, paid to the defendant the said
22 sum of $5,531.28. Defendant, however, denies all other allegations in said paragraph 7 of the third cause of action in the petition.

8. Defendant denies the allegations in paragraph 8 of the third cause of action set forth in the petition.

9. Defendant admits the allegations in paragraph 9 of the third cause of action set forth in the petition.

In answer to the fourth cause of action set forth in the petition:

1. Defendant admits the allegations in paragraph 1 of the fourth cause of action set forth in the petition with the exception of the allegation that "on the 14th day of April, 1927", the plaintiff filed his federal income tax return for the calendar year 1926; and with the further exception of the allegation that "the lawful tax upon said return was $1,518.43", which allegations defendant denies. Defendant,

however, alleges that on July 22, 1927, the plaintiff filed his federal income tax return for the calendar year 1926.

2. Defendant admits the allegation in paragraph 2 of the fourth cause of action set forth in the petition that in said return the plaintiff included the sum of $57,869.34 as income from fiduciaries. Defendant, however, denies all other allegations in said paragraph 2.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the fourth cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the fourth cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the fourth cause of action set forth in the petition.

6. Defendant admits the allegations in paragraph 6 of the fourth cause of action set forth in the petition that on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1926 in the sum of $3,595.67; and that
23 such determination and assessment was based wholly on the disallowance by the commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaintiff's return of the sum of $23,935.02. Defendant, however, denies each and every other allegation in said paragraph 6 of the fourth cause of action in the petition.

7. Defendant admits the allegations in paragraph 7 of the fourth cause of action set forth in the petition that the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon amounting to $377.55, making a total of $3,973.22; and that the plaintiff on December 29, 1928, paid to the defendant the said sum of $3,973.22. Defendant, however, denies all other allegations in said paragraph 7 of the fourth cause of action in the petition.

8. Defendant denies the allegations in paragraph 8 of the fourth cause of action set forth in the petition.

9. Defendant admits the allegations in paragraph 9 of the fourth cause of action set forth in the petition.

In answer to the fifth cause of action set forth in the petition:

1. Defendant admits the allegations in paragraph 1 of the fifth cause of action set forth in the petition.

2. Defendant admits the allegations in paragraph 2 of the fifth cause of action set forth in the petition that in said return the plaintiff included the sum of $34,010.99, as income from fiduciaries. Defendant, however, denies all other allegations in said paragraph 2.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the fifth cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the fifth cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph
24 5 of the fifth cause of action set forth in the petition.

6. Defendant denies the allegation in paragraph 6 of the fifth cause of action set forth in the petition that on November 29, 1929, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1927 in the sum of $6,465.27, after deducting an overpayment of $438.15. Defendant, however, alleges that on November 29, 1929, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1927, in the sum of $5,769.82. Defendant admits that this additional tax determination and assessment was based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the plaintiff's return of the sum of $24,868.38. Defendant

admits that such disallowance of depletion and addition to income were made on the claim of the Commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion. Each and every other allegation in said paragraph 6 of the fifth cause of action the defendant denies.

7. Defendant admits the allegations in paragraph 7 of the fifth cause of action set forth in the petition.

8. Defendant denies the allegations in paragraph 8 of the fifth cause of action set forth in the petition.

9. Defendant admits the allegations in paragraph 9 of the fifth cause of action set forth in the petition.

Wherefore, defendant demands judgment that the petition be dismissed and for costs herein.

ALBERT D. WALTON,
United States Attorney,
Attorney for Defendant.

United States of America, District of Wyoming—ss.

Albert D. Walton, being of lawful age, and being
25 first duly sworn according to law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is attorney for the defendant in the above-entitled cause; that he has read the above and foregoing Answer and knows the contents thereof, and that all of the facts therein stated and allegations therein contained are true, as he verily believes.

ALBERT D. WALTON.

Subscribed in my presence and sworn to before me this 30th day of March, A. D. 1931. Capitola G. Allison, Deputy Clerk, U. S. District Court for the District of Wyoming.

Stipulation of Waiving of Trial by Jury.

Filed May 11, 1931.

It is hereby stipulated by and between the parties
26 to the above entitled cause and their respective attorneys that the said cause may be tried to the Court

without the intervention of the jury, trial by jury being hereby expressly waived.

Dated this 11th day of May, 1931.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

ALBERT D. WALTON,
Attorney for Defendant.

Richard F. Cooper, Plaintiff, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2062, Civil-Law.

Barbara V. Cooper, Plaintiff, v, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2063, Civil-Law.

Richard F. and Barbara V. Cooper, Plaintiffs, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, No. 2064, Civil-Law.

Filed April 7, 1932.

Corthell, McCullough & Corthell of Laramie, Wyo.,
27 for Plaintiff.

Albert D. Walton, U. S. Attorney, of Cheyenne, Wyo., John R. Wheeler, Special Attorney, C. M. Charest, General Counsel, and Percia E. Miller, Special Attorney, all of the Bureau of Internal Revenue, of Washington, D. C., for Defendant.

Judge's Memorandum.

Decided April 7, 1932.

KENNEDY, District Judge.

These are cases in which the plaintiffs are seeking to recover income taxes assessed by the commissioner in the nature of deficiencies and paid under protest, appropriate
28 demands having been subsequently made to refund the same and refused. After issues were joined, the causes were tried and submitted together upon a stipulation of facts, jury being waived. Trial briefs have been filed.

The matter raises a rather controversial point of law which

will undoubtedly invite a review by an appellate court, so that an extended rehearsal of the facts by this Court would seem unnecessary in the light of their being stipulated. Suffice it to say, that the question presented for determination is, as to whether or not the plaintiffs as beneficiaries under a trust created by the Will of one Arthur Francis Thomas Cooper are entitled to an allowance for a depletion as applied to their proportionate shares of funds accruing from oil royalties collected by said trust and distributed to them as such beneficiaries. Such depletion was claimed by plaintiffs for various years, extending from the year 1923 to the year 1928, and under the stipulation as I view it, the amounts sought to be recovered by the plaintiffs are the identical amounts paid as taxes by said plaintiffs under protest, representing the deductions for depletion, the computation of such depletion not being in dispute. Except as there may be possible corrections to be made on account of tax computations, the same general principle underlies the determination of the question as a matter of law in each case and therefore this memorandum will not discuss details.

The various income tax statutes under which the commissioner purported to assess the tax for the several years are substantially the same as applied to the point under consideration.

The Will, so far as its pertinent portions are here concerned, provides as follows:

> "14. I give devise and bequeath all the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell call in collect and convert into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any
29 part or parts of the said premises during such period

as they shall think proper, and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to arise from such calling in or conversion pay my funeral and testamentary expense and debts and the legacies and annuities bequeathed by this my will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such money after payment of legacy duty thereon as to the first sixty thousand pounds thereof upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof upon trust to pay one equal third share to each of my said children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) upon the trusts declared concerning the first sixty thousand pounds."

"15. I hereby declare that my trustees shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same upon trust to invest the same in any of the securities authorized by this my will with full power to sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages or times if more than one, in such shares and with such future or other trusts for their benefit, and such provisions for their respective advancement either in life-time or after the death of my said daughter and main-

tenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any, the children or child, or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females, shall attain that age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

"16. I hereby declare that in the event of my daughter dying without leaving any issue, her surviving my trustees shall hold the said trust premises upon trust for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who, being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares and so
30 that the division shall be per stirpes and not per capita Provided that any share appointed to any child of mine or my said daughter or his or her issue, under the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the unappointed part of the said trust premises.

"17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or

being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken had he or she survived me if more than one in equal shares per stirpes and not per capita.

"18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for the survivor of them absolutely."

As I view the situation here presented, the determining factor in the matter of the validity of the tax, is as to whether the plaintiffs as beneficiaries under said trust have or have not an interest in the corpus covered by the trust. If they have such an interest the depletion is properly deductible and the tax is improperly assessed; while on the contrary, if they have no interest in such corpus, the depletion charged is not deductible and the taxes are proper.

That the disagreement arises over oil royalties of which the testator was possessed and the proceeds from which have subsequently come into the trust, is not in dispute. The income tax figures were arrived at by the fiduciary deducting from the royalties the properly computed depletion which in turn was claimed in proportionate amounts by the beneficiaries in the computation of their income.

The provisions of the Will concerning the trust features, construed as free from legal technicality, amount to the mere passing of the income accruing from the royalties through the trust to the beneficiaries and therefore in substance,
31 the situation is the same as though the beneficiaries

were receiving such royalties direct, in which latter situation there could be no doubt that the beneficiaries would be entitled to a deduction by way of appropriate depletion in connection with this class of property. To hold otherwise would mean in substance that such beneficiaries were paying a tax on property, which is not within the contemplation nor is it permissible under the provisions of the Sixteenth Amendment and the statutes enacted thereunder.

Further elaboration of the views of this Court concerning the rule of law to be applied to the trust under consideration would serve no useful purpose. I am unable to distinguish on principle this case from the case of Merle-Smith v. Commissioner, 42 Fed. (2d) 837, in which case certiorari was denied by the Supreme Court. 282 U. S. 897. Depletion was there allowed the beneficiaries.

It should be remembered that tax statutes in case of doubt are most strongly construed against the Government. Gould v. Gould, 245 U. S. 151; United States v. Merriam, 263 U. S. 179; Burnet v. Niagara Falls B. Co., 282 U. S. 648; and that in applying the provisions of the income tax laws matters of form should be disregarded for those of substance. United States v. Phellis, 257 U. S. 156.

Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinbefore stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases.

Richard F. Cooper, Plaintiff, vs. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2062 Civil.

Filed May 13, 1932.

Judgment.

32 This cause having heretofore come on to be heard before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury, and the plaintiff having ap-

peared by N. E. Corthell, his attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Attorney for the District of Wyoming, his attorneys; and the Court having taken the case under advisement, and having considered the stipulation of facts, and the other evidence, and the admissions made in open court, and having heard the argument of counsel, and being now fully advised:

The Court finds generally for the plaintiff, Richard F. Cooper, and against the defendant, Marshall S. Reynolds, Individually, and as Collector of Internal Revenue, upon the first cause of action for the sum of Five Thousand Ninety-seven and 77/100 Dollars ($5,097.77) with interest at the rate of 6% per annum from December 29, 1928; upon the second cause of action for the sum of Four Thousand Nine Hundred Eighty-seven and 85/100 Dollars with interest at the rate of 6% per annum from December 29, 1928; upon the third cause of action for the sum of Five Thousand Five Hundred Thirty-one and 28/100 Dollars ($5,531.28) with interest at the rate of 6% per annum from December 29, 1928; upon the fourth cause of action for the sum of Three Thousand Nine Hundred
33 Seventy-three and 22/100 Dollars ($3,973.22) with interest at the rate of 6% per annum from December 29, 1928; and upon the fifth cause of action for the sum of Four Hundred Thirty-eight and 15/100 Dollars ($438.15) with interest at the rate of 6% per annum from December 15, 1928, and for the further sum of Six Thousand Four Hundred Sixty-five and 27/100 Dollars ($6,465.27) with interest at the rate of 6% per annum from February 13, 1930.

It is therefore considered and adjudged by the Court that the plaintiff, Richard F. Cooper, do have and recover from the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the first cause of action the said sum of Five Thousand Ninety-seven and 77/100 Dollars ($5,097.77) together with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the second cause of action the said sum of Four Thousand Nine Hundred Eighty-seven and 85/100 Dollars ($4,987.85) together with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the third cause of action for the said sum

of Five Thousand Five Hundred Thirty-one and 28/100 Dollars ($5,531.28) with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the fourth cause of action for the said sum of Three Thousand Nine Hundred Seventy-three and 22/100 Dollars ($3,973.22) with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the fifth cause of action for the said sum of Four Hundred Thirty-eight and 15/100 Dollars ($438.15) with interest thereon at the rate of 6% per annum from December 15, 1928, and the further sum of Six Thousand Four Hundred Sixty-five and 27/100 Dollars with interest at the rate of 6% per annum from February 13, 1930; together with the costs of the action to be taxed.

To which finding and judgment and each and every portion thereof the defendant excepted at the time; and the defendant is hereby allowed sixty days within which to prepare and file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collec-
34 tion of the income taxes for the recovery of which this action was brought.

Done in open court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Petition for Appeal.

Filed Aug. 8, 1932.

The above-named defendant, Marshall S. Reynolds,
35 Individually and as Collector of Internal Revenue, petitioner herein, feeling himself aggrieved by the order and judgment entered in the above-entitled cause on the 13th day of May, A. D. 1932, in favor of the plaintiff in the above-entitled action, and against the defendant herein, wherein and whereby it was ordered and adjudged that plaintiff have judgment against the defendant, does hereby appeal from said order and judgment entered on the 13th day of May, A. D. 1932, and from the whole thereof, to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons

and upon the grounds specified in his assignment of errors filed herein, and defendant prays that this, his petition for appeal, and his said appeal may be granted and allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings, and papers upon which said order and judgment was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 8th day of August, A. D. 1932.

MARSHALL S. REYNOLDS,
Individually and as Collector of Internal Revenue, Defendant,

By ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue.

Attorneys for Defendant.

Assignment of Errors.

Filed Aug. 8, 1932.

Marshall S. Reynolds, Individually and as Collector
36 of Internal Revenue, defendant in the above-entitled cause, by Albert D. Walton, United States Attorney for the District of Wyoming, Ewing T. Kerr, Assistant United States Attorney for the District of Wyoming, and John R. Wheeler, Special Attorney for the Bureau of Internal Revenue, his attorneys, having filed petition for appeal as provided by law, that defendant appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final order and judgment made and entered in said cause on May 13, 1932, in favor of the plaintiff and against the defendant herein, now makes and files in support of said appeal the following assignment of errors, upon which it will rely for

reversal o said final order and judgment upon the said appeal, which said errors, and each and every one of them, are to the great detriment, injury, and prejudice of this defendant, and defendant says that in the records and the proceedings on the hearing and determination of this cause in the District Court of the United States for the District of Wyoming there are manifest errors in this, to-wit:

I.

The Court erred in holding that the sum of $24,676.14, claimed by plaintiff as deduction for depletion was not income to plaintiff for the year 1923.

II.

The Court erred in holding that the sum of $4,037.84,
37. assessed as additional income of plaintiff for year 1923, and which together with interest thereon in the sum of $1,059.93 was collected from plaintiff, was illegally assessed and illegally collected.

III.

The Court erred in holding that the sum of $24,348.82, claimed by plaintiff as deduction for depletion was not income to plaintiff for the year 1924.

IV.

The Court erred in holding that the sum of $4,147.90, assessed as additional income of plaintiff for year 1924, and which together with interest thereon in the sum of $839.95, was collected from plaintiff, was illegally assessed and illegally collected.

V.

The Court erred in holding that the sum of $21,724.65, claimed by plaintiff as deduction for depletion was not income to plaintiff for the year 1925.

VI.

The Court erred in holding that the sum of $4,747.88, assessed as additional income of plaintiff for year 1925, and which together with interest in the sum of $783.40, was collected from plaintiff, was illegally assessed and illegally collected.

VII.

The Court erred in holding that the sum of $23,935.02, claimed by plaintiff as deduction for depletion was not income to plaintiff for the year 1926.

VIII.

The Court erred in holding that the sum of $3,595.67, assessed as additional income of plaintiff for the year 1926, and which together with interest thereon in the sum of $377.55, was collected from plaintiff, was illegally assessed and illegally collected.

IX.

The Court erred in holding that the sum of $24,868.38, claimed by plaintiff as deduction for depletion was not
38 income to plaintiff for the year 1927.

X.

The Court erred in holding that the sum of $6,903.42, assessed as additional income of plaintiff for the year 1923, and which amount less an over-payment of $438.15, was collected from plaintiff, was illegally assessed and illegally collected.

XI.

The Court erred in overruling defendant's motion for judgment in favor of defendant.

XII.

The Court erred in granting and allowing plaintiff's motion for judgment against defendant.

XIII.

The Court erred in making and entering judgment in favor of the plaintiff and against the defendant.

Therefore defendant prays that the said order and judgment entered herein, as aforesaid, in favor of the plaintiff and against the defendant, be set aside, annulled, reversed, and held for naught, and that said cause be remanded to the District Court for further proceedingings in the premises,

and for such other and further relief to which defendant may be entitled.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming.

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant,

Order Allowing Appeal.
Filed Aug. 8, 1932.

The above-entitled cause coming on regularly to be
39 heard upon the petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the above-named defendant, praying that an appeal be allowed herein from the order and judgment made and entered herein on May 13, A. D. 1932, and for the reversal of said order and judgment, and said petitioner having filed herein and presented to this Court his said petition for appeal and an assignment of errors relied on and intended to be urged by him upon said appeal, and it appearing to the Court that petitioner is entitled to said appeal:

Now, therefore, on motion of Ewing T. Kerr, Esquire, Assistant United States Attorney for the District of Wyoming, of counsel for the petitioner, it is ordered that the said petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, defendant above named, for appeal from said order and judgment made and entered on May 13, A. D. 1932, be, and the same hereby is, granted, and the said appeal be, and the same hereby is, allowed without the filing of an appeal bond by or on behalf of said defendant.

Dated this 8th day of August, A. D. 1932.

T. BLAKE KENNEDY, Judge.

[Citation in proper form, directed to appellee, with acceptance of service by counsel for said appellee, was filed in the District Court on Aug. 11, 1932.]

BILL OF EXCEPTIONS.

Filed Sept. 2, 1932.

Be it remembered that on the 7th day of January,
42 A. D. 1932, at ten o'clock A. M. of said day, the above-entitled cause came on for trial before the Court without the intervention of a jury, a trial by jury having been waived in writing, the Honorable N. E. Corthell appearing as attorney for plaintiff, and Albert D. Walton, United States Attorney for the District of Wyoming, and the Honorable John R. Wheeler, Special Attorney, Bureau of Internal Revenue, appearing on behalf of defendant.

After opening statements by counsel, the following proceedings were had:

A stipulation of facts having been filed in this cause was offered and received in evidence and is as follows:

Stipulation of Facts.

It is hereby stipulated and agreed, by and between the parties hereto by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not in-
43 consistent with the facts herein stipulated to be taken as true.

1. The plaintiff filed with the defendant, as Collector of Internal Revenue, returns of taxable income for the several years hereinafter mentioned. Such returns were filed respectively as follows:

For 1923, on or about May 12, 1924,

For 1924, on or about March 14, 1925,

For 1925, on or about Aug. 26, 1926,

For 1926, on or about July 22, 1927,

For 1927, on or about April 16, 1928.

The income taxes shown by said returns respectively were paid by the plaintiff to the defendant, as follows:

For 1923, $2,184.37 (of which $819.14 was later refunded);

For 1924, $2,263.57;

For 1925, 6,321.71;

For 1926, $2,000.00 (of which $481.57 was later refunded);
For 1927, $29,344.20 (of which $438.15 was later determined to be an overpayment).

2. In each of said returns the plaintiff included sundry amounts as income from fiduciaries claimed by the plaintiff to represent the distributive share of the plaintiff of the income from the trust established under the Will of A. F. T. Cooper, deceased. The sums so included in said returns for the respective tax years mentioned were as follows:

1923,	$18,475.79
1924,	$24,584.20
1925,	$38,354.31
1926,	$57,869.34
1927,	$34,010.99

3. The right and interest of the plaintiff, with respect to which his distributive share accrued to the plaintiff, was derived under the Will and codicil thereto of said A. F. T. Cooper, a copy of which is hereto attached and marked Exhibit A and is hereby made a part hereof as though fully set out at this point.

4. Said A. F. T. Cooper in his lifetime, to-wit, on
44 October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. A copy of said lease is attached hereto and marked Exhibit B and is hereby made a part hereof as though fully set out at this point. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said Will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during 1923 and subsequent years the residuary clause of the said codicil was operative; and

the trustees distributed the receipts of 1923 and subsequent years, consisting of royalties under the said lease and interests on funds in their hands, in the manner following, to-wit: The receipts accruing prior to September 13, 1923, in the proportions of one-half to the plaintiff, one-fourth to the administrator of the estate of said John Hartshorn Cooper (deceased in 1921), and one-fourth to Barbara V. Cooper, or to her use; and the receipts accruing on and after September 13, 1923, in the proportions of one-half to the plaintiff in his own right, one-eighth to the plaintiff, as devisee under the Will of John Hartshorn Cooper (deceased in 1921), and the remaining three-eighths to Barbara Violet Cooper, named in said Will and codicil, or to her use.

5. In each of the years 1923 to 1927, inclusive, the said trustees filed with the defendant, as Collector of Internal Revenue, a fiduciary information return. The fiduciary return for each of the years 1923 to 1927, showed gross receipts, consisting of interest on funds in the hands of the trustees and gross receipts accruing from oil and gas royalties, from the aggregate amount of which the trustees deducted taxes and expenses paid, and also deducted depletion, resulting in a net income, from which amount of net income the plaintiff's share, as stated in the fiduciary income, was derived. The gross income, taxes and expenses, depletion as claimed by the trustees, the net income and the plaintiff's share, as stated by the trustees, for each of the years 1923 to 1927, are as follows:

	Gross Income	Taxes and Expenses	Depletion Deducted by Trustees.
1923	$ 88,148.47	$ 7,891.55	$ 43,608.67
1924	83,196.47	3,611.20	38,957.78
1925	102,440.95	6,314.62	34,759.43
1926	135,487.79	4,600.81	38,296.04
1927	99,502.00	5,295.00	39,789.46

	Net Income	Plaintiff's Share as Stated by Trustees.
1923	$ 36,648.25	$ 18,475.79
1924	40,627.49	24,584.20
1925	61,366.90	38,354.31
1926	92,590.94	57,869.34
1927	54,417.54	34,010.99

6. If the contention of the plaintiff that depletion
45 is lawfully allowable to the plaintiff is determined by the Court in his favor, then the deductions to be allowed from gross income of the plaintiff on account of depletion for the years 1923, 1924, 1925, 1926 and 1927, are the amounts which have been claimed by the plaintiff in the Federal income tax returns filed for those years and which are as follows:

1923	$ 24,676.14
1924	24,348.62
1925	21,724.65
1926	23,935.02
1927	24,868.38

It is, however, agreed that the defendant objects to the materiality, competency or relevancy of the above amounts of depletion inasmuch as the defendant contends that under the provisions of the Will of A. F. T. Cooper, as properly construed, the plaintiff has no present property interest in the corpus which would warrant the right to a depletion deduction, or serve as a basis for a depletion deduction.

7. On October 12th, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff for each of the years 1923 to 1926, inclusive, additional income taxes; and on November 29th, 1929, said commissioner determined and assessed against the plaintiff an additional income tax for 1927. Such additional income taxes so determined and assessed for each of said tax years were in the following amounts:

1923	$4,037.84
1924	4,113.30 (to which was added an alleged erroneous refund on account of 1923 of $34.60 making a total of $4,147.90).
1925	4,747.88
1926	3,595.67
1927	5,769.82

Such determinations and assessments were respectively
46 based wholly on the disallowance by the commissioner of the deductions claimed in the fiduciary returns of the trustees for depletion of the oil and gas properties from which the royalties aforesaid were derived and the addition of the following sums to the net income shown by the plaintiff's respective returns for each of said tax years:

1923	$ 24,676.14
1924	24,348.62
1925	21,724.65
1926	23,935.02
1927	24,868.38

8. On December 29, 1928, the defendant demanded payment by the plaintiff of such additional taxes, and interest thereon, for the said years 1923 to 1926, inclusive; and, on February 14, 1930, the defendant demanded payment by the plaintiff of such additional tax and interest thereon, for 1927, in the respective amounts for said tax years, as follows:

1923	$5,097.77
1924	4,987.85
1925	5,531.28
1926	3,973.22
1927	6,465.27

The plaintiff thereupon, on the dates of said demands, respectively, and under protest, paid to the defendant, as Collector of Internal Revenue, the respective sums demanded as aforesaid.

9. On September 14, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue applications to refund the sums paid, as aforesaid, to the defendant for the years 1923 to 1926, inclusive, with interest thereon, upon the grounds aforesaid, and demanded payment thereof, and thereafter, to-wit, on October 14, 1930, such applications and demands were respectively refused. On February 14, 1930, the plaintiff made and filed with
47 the defendant and the Commissioner of Internal Revenue an application to refund the additional tax, with interest thereon paid for the year 1927, upon the grounds aforesaid, and demanded payment thereof. More than six

months had elapsed after the making and filing of said applications before the commencement of this action.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney,

JNO. R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Exhibit A.

This is the last Will and Testament of me Arthur
48 Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby, England.

1. I hereby revoke all former wills and testamentary dispositions made by me and declare this to be my last will and testament.

2. I appoint my son Richard Francis Cooper and my brother in law the Reverend Christopher Barber Collinson and Edgar Percy Lewis of No. 32 Queen Victoria Street in the city of London Solicitor to be the executors and trustees of this my will and they and the survivor of them and the executors and administrators of such survivor his and their assigns or other the trustees or trustee for the time being of this my will are hereinafter referred to as "my trustees".

3. I give to the said Reverend Christopher Barber Collinson a legacy of five hundred pounds free of legacy duty and to the said Edgar Percy Lewis a legacy of two hundred pounds free of legacy duty if they shall prove this my will and any codicil or codicils I may make thereto and act in the trusts thereof.

4. I bequeath the use and enjoyment of all articles of personal or domestic or household or stable or garden use or ornament belonging to me to my wife Jane Mary Evelyn Cooper during her life she keeping the same properly insured

against loss or damage by fire and after her death but subject to the exercise of the power of gift hereinafter given to my said wife I bequeath the same to my said son Richard Francis Cooper. And I declare that it shall not be necessary for my trustees to take any inventory of the articles bequeathed by this clause and that my trustees shall not be concerned to see to the insurance thereof or be liable for any loss or damage that may happen thereto from any cause whatever. And I expressly declare that my said wife shall have full liberty during her lifetime to give any or all of my big game or other trophies to my son Richard Francis Cooper and to him and either of my other children any of the articles (other than the said big game and other trophies) bequeathed to her for life by this clause.

5. I give devise and bequeath subject to my wife's life interest therein the ten thousand pounds or other the investments for the time being representing the husband's fund of the settlement made on my marriage with my present wife in one thousand eight hundred and ninety-nine equally to and amongst my three children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts hereinafter declared in clause 15 hereof.

6. I give to my daughter Barbara Violet Cooper the sum of five thousand pounds free of legacy duty to be paid in priority to all legacies bequeathed by this my will and to be held by my trustees upon the trusts hereinafter declared concerning the same in clause 15 hereof.

7. I give to my old and faithful servant Philip Austin a legacy of one hundred pounds free of legacy duty.

8. I bequeath to the said Philip Austin, an annuity of one pound a week and to my old servant Jessie Oliver an annuity of ten shillings a week. Both annuities are to be free from death duties and are to commence from the day of my death and to be payable weekly and the first payments thereof are to be made as soon as my trustees can conveniently make the same immediately after my death.

9. Provided always and I declare that if any act or event shall happen in my lifetime or after my death whereby the said annuities or either of them would if belonging

49 absolutely to the said Philip Austin or the said Jessie Oliver respectively become vested in or charged in favour of some other person or persons or a corporation than such annuity shall cease as if he or she were dead. Provided always and I declare that my trustees shall not be liable or responsible for paying the annuities hereinbefore bequeathed to the said Philip Austin and Jessie Oliver or either of them after the determination during his or her lifetime of the trust hereinbefore declared in his or her favour unless or until my trustees shall have received express notice of the event causing such failure or determination.

10. I authorise my trustees in case at any time with a view to the due administration or distribution of my estate it shall be deemed convenient so to do to appropriate and retain a sufficient part of my estate or the investments representing the same for answering by the annual income thereof any annuity hereinbefore bequeathed but without prejudice to the powers of sale and investment and transposing investments hereinafter contained and I declare that if the annual income of the appropriated fund shall at the time of appropriation be sufficient to satisfy such annuity such appropriation shall be a complete satisfaction of the trust to provide for such annuity and that if the income of the appropriated fund shall at any time and from any cause whatever prove insufficient for payment of such annuity in full resort may be had to the capital thereof from time to time to make up such deficiency and the surplus income (if any) of the said fund from time to time after the payment of the said annuity shall be applicable as income of my residuary estate. And I declare that as and when such annuity shall cease the appropriated fund shall sink into my residuary estate.

11. I give to my trustees the sum of ten thousand pounds free of legacy duty upon trust to invest the same in any of the stocks shares and securities authorised by this my will and with power from time to time to vary such investments as they may see fit and to pay the income arising from such investments to my said wife Jane Mary Evelyn Cooper during her life for her own separate use and without power of anticipation and from and after her death upon trust as well income as capital for my two sons Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

12. Whereas I have in the events that have happened a power of appointment over the funds subject to an indenture of settlement dated the eighteenth day of June one thousand eight hundred and eighty-eight made on my marriage with my late wife Dorothy Jane Collinson now therefore I hereby appoint that the trustees for the time being of the said settlement shall stand possessed of the investments for the time being representing the fund subject to the trusts of such settlement upon trust as to one equal third share for my son Richard Francis Cooper and as to another equal third share for my son John Hartshorn Cooper and as to the remaining equal third share for my daughter Barbara Violet Cooper absolutely. Provided always and I hereby declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue then I appoint that the one-third share of the one so predeceasing me shall be held upon trust for the other of them and in the event of their both predeceasing me without leaving issue I appoint that their one-third shares shall be held upon trust for the said Barbara Violet Cooper absolutely. And I also declare and appoint that in the event of the said Barbara Violet Cooper predeceasing me without leaving issue that her one-third share shall be held upon trust for the said Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

13. I devise and bequeath all my freehold land messuages and premises known as the Culland Hall estate in the county of Derby unto and to the use of my trustees upon trust for my wife Jane Mary Evelyn Cooper for life and from and after her death upon trust for my said son Richard Francis Cooper his heirs and assigns forever.

14. I give devise and bequeath all the residue of
50 my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell call in collect and convert into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees

that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to arise from such calling in or conversion pay my funeral and testamentary expense and debts and the legacies and annuities bequeathed by this my will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon as to the first sixty thousand pounds thereof upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof upon trust to pay one equal third share to each of my said children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) upon the trusts declared concerning the first sixty thousand pounds.

15. I hereby declare that my trustee shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same upon trust to invest the same in any of the securities authorised by this my will with full power to sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in the lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustees or any other person or per-

sons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any the children or child or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females shall attain that age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

16. I hereby declare that in the event of my daughter dying without leaving any issue her surviving my trustees shall hold the said trust premises upon trust for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares
and so that the division shall be per stirpes and not
51 per capita. Provided that any share appointed to any
child of mine or my said daughter or his or her issue under the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the unappointed part of the said trust premises.

17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken

had he or she survived me if more than one in equal shares per stirpes and not per capita.

18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for the survivor of them absolutely.

19. I declare that all estate duty on my Culland Hall estate and death duties on my foreign and colonial property (if any) and all legacy duty payable in respect of any devise legacy or annuity under this my will consequent on my death but not on the death of any life tenant or annuitant shall be paid out of my residuary estate.

20. I hereby declare that the said Edgar Percy Lewis or any trustee being a solicitor or any other person engaged in any profession or business may be employed to act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts hereof including acts which a trustee could have done personally.

21. My trustees shall invest in their names all monies which for the time being may be subject to the trusts of this my will and requiring investment in or upon (a) The public stocks or funds or government securities of the United Kingdom or of India or of any British colony or dependency or state or of any foreign government or state (b) Freehold copyhold or chattel real securities in England Scotland or Wales (c) The bonds debentures debenture stock mortgage obligations or securities or the guaranteed or preference or ordinary or preferred ordinary or deferred ordinary stock or shares of any company incorporated or registered in or

under the legislature of the United Kingdom or of India or of any British colony or dependency or state or of any foreign country or state on which there is no liability and provided that interest or dividends shall for the three years immediately preceding the date of investment have been regularly paid by any such company on its ordinary stock or shares (d) The securities of any public or municipal or local body or authority in the United Kingdom or in any British colony or dependency or state or in any foreign country or state.

22. I hereby appoint my trustees trustees for all the purposes of the Settled Land Acts 1882-1890 and section 42 of the Conveyancing Act 1881.

23. I hereby declare that all gifts legacies devises
52 and share of residue given to my said sons and daughter are in addition to any gifts made to them during my lifetime unless I have in making any such gift declared in writing to the contrary. In Witness Whereof I have to this and the five preceding sheets of paper hereunto set my hand this eighteenth day of June one thousand nine hundred and eighteen.

ARTHUR FRANCIS THOMAS COOPER.

Signed by the said Arthur Francis Thomas Cooper the testator as and for his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—J. F. Talley—C. J. Walsh—) Clerks to Messrs g f hudson matthews 7 co 32 queen victoria street London e c 4 Solrs.

This is a first codicil to the last will and testament dated the eighteenth day of June one thousand nine hundred eighteen of me Arthur Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby Esquire.

1. I hereby declare that my trustees shall have full power of postponing for any length of time as in their uncontrolled discretion they may think fit the realization of the oil rights under my ranch in Wyoming U. S. A., without being liable for any loss arising therefrom and of deciding what proportion of the annual receipts therefrom shall be treated as

capital and what proportion as income and their decision shall be considered for all purposes as final.

2. I hereby revoke that part of clause 14 of my said will which succeeds the words "and shall hold the residue of such moneys after payment of legacy duty thereon" and in lieu and stead thereof I declare that clause 14 shall read from and after such words as follows, viz:.

"Upon trust (as to the first twenty-one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper the sum of seven thousand pounds to my son John Hartshorn Cooper and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate and as to the residue (if any) thereof upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely and as to one fourth part or share for my said son John Hartshorn Cooper absolutely and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and, with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

3. I declare that if my residuary estate without the value of my said oil rights is not equal to twenty-one thousand pounds my trustees shall until the realization of my oil rights or sufficient of them to produce with the rest of my residuary estate the said sum of twenty-one thousand pounds mentioned in clause 2 hereof or the expiration of twenty-one years after my death whichever shall be the shorter period pay out of the annual income from my residuary estate to each of my said sons during his life the sum of three hundred and fifty pounds less income tax or if such income is insufficient to pay such sums divide the same equally between my said sons and accumulate the balance in any year in which the income shall be more than sufficient for the payment of the said sum of three hundred and fifty pounds and such accumulations shall be considered as capital monies and held upon the trusts declared concerning my residuary estate.

4. I declare that if after the payment of the said

53 sum of twenty-one thousand pounds all my oil rights have not been realized my trustees shall value my daughters one-fourth share of such oil rights and shall pay to her out of the monies received each year from such oil rights a sum equal to ten per cent free of income tax on such value and accumulate the balance (if any) and such accumulations shall be considered as capital monies and held upon the trusts declared concerning her said trust legacy of five thousand pounds.

5. In all other respects I confirm my said will.

In Witness whereof I have hereunto subscribed my name this twelfth day of November one thousand nine hundred and eighteen—Arthur Francis Thomas Cooper—Signed by the said Arthur Francis Thomas Cooper as and for a first codicil to his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—F. B. Hulke—Admiralty House Deal Surgeon—M A Tucker Evans 22 Langham Street London Nursing Sister.

Exhibit B.

Copy

This Memorandum of Agreement made the ninth
54 day of October, 1917, between Frank Cooper and Frank O. Harrison, as Trustee for the use of said Frank Cooper, parties of the first part, and The Ohio Oil Company, a corporation, formed under the laws of Ohio, of Casper, Wyoming, party of the second part, Witnesseth:

1. The first parties have granted to the second party the exclusive privilege to prospect and explore for oil and gas and to develop and produce oil and gas on the following described lands of the parties of the first part, to-wit:

All of Sections One (1), Two (2), Three (3), Eleven (11), Thirteen (13), Fifteen (15), Twenty-three (23), and the West Half of the West Half (W½W½) of Section Twelve (12), and the West Half of the Northwest Quarter (W½NW¼), the Southeast Quarter of the Northwest Quarter (SE¼NW¼), and the Northwest Quarter of the South-

west Quarter (NW¼SW¼) of Section Fourteen (14), all in Township Nineteen (19) North of Range Seventy-eight (78) West, and the North Half (N½), the West Half of the Southeast Quarter (W½SE¼), and the Southwest Quarter (SW¼) of Section Twenty-seven (27), and the South Half (S½) of Section Thirty-five (35), all in Township Twenty (20) North of Range Seventy-eight (78) West of the Sixth Principal Meridian, all situated in Carbon County, Wyoming.

The second party may employ all lawful and usual means to discover, develop and produce oil and gas upon said lands, and shall forthwith enter upon such undertaking and prospect, drill, explore for, develop and produce the same with all usual and reasonable diligence continuously during the continuance of this agreement.

It is understood between the parties that the parties of the first part herein have heretofore conveyed away all their right, title and interest in said lands "excepting and reserving however unto the said Frank Cooper, and unto the said Frank O. Harrison, as Trustee, for the use of said Cooper, and to their heirs, successors and assigns all oil and all gas underlying the said lands or any of them with the perpetual right to explore for develop, extract and take away the same".

It is especially agreed that the second party shall in all things keep within the rights so excepted and reserved, and shall not interfere with the rights of the prior grantees of said Cooper and Harrison.

2. This agreement, unless sooner terminated for cause, shall continue for the period of twenty (20) years from the date hereof. In the event that oil or gas in paying quantities is being produced at the expiration of the 20-year period aforesaid, the second party shall be entitled to an extension of said period for a further term of twenty years, upon like conditions, but the royalty payments during such extended period shall be at the rate of twenty per cent (20%).

3. The second party will pay to the first parties the sum of one hundred dollars ($100.00) as a minimum rental for each full section of said lands or the equivalent of a full section for each year during the continuance of this agreement. Each of said payments shall be applied on the per-

centage, if any, to be paid within the year to the first parties as herein provided.

4. In the event that the production of oil and gas in any year shall not be sufficient to compensate the minimum payment for such year, then such payment shall be taken to be rental for the said premises for such time as the same shall have been occupied within such year.

5. At all times during the continuance of the privilege hereby granted the second party shall prosecute the
55 work of discovery, development and production of oil and gas with diligence suitable to the undertaking and adequate to realize the full benefit of the natural resources of said lands, practicing the best and most approved appliances employed in the same or similar fields for such purposes, and using due care to see that the oil and gas within said lands shall be produced from wells within the limits thereof and not drained away through wells on neighboring lands. It is the intent of this agreement that the second party shall develop and produce oil and gas from all the various oil or gas bearing strata is said lands of whatsoever depth within practicable limits. No waste shall be permitted. Loss by fire, explosion or other casualty shall be carefully guarded against. Adequate facilities for storage and transportation shall be provided. If devices for the conversion of gas into oil shall be employed or shall be practicable in the same or similar fields, such appliance shall be put in use on said premises, all by the second party. The second party shall drill at least one well at a convenient and promising location to be selected by it near the dividing line between said Sections 2 and 35, to a sufficient depth to reach the supposed oil bearing sands in that region corresponding to the so-called Frontier sand in the Lost Soldier field or the Wall Creek sand in the Salt Creek field in Wyoming, not exceeding, however, a depth of three thousand feet (3,000). The drilling of such well shall be commenced within sixty (60) days after acceptance by the first parties of this agreement, and drilling shall be prosecuted with all reasonable diligence continuously thereafter and the drilling of such well shall be completed within six months from the time of commencement. During the second six months not less than one additional well shall be drilled by the second party as

above specified; during each subsequent six months not less than two additional wells. On default in these requirements the first party may terminate this agreement, offsetting wells shall be drilled by second party against each foreign well within three hundred (300) feet of the boundary line.

6. The second party shall keep full and accurate logs of all drillings; full and complete accounts and records of all discoveries, production and disposition of oil and gas, and accurate accounts of all expenditures in the aforesaid undertakings. At all times free access shall be given to the first parties or their representatives to the premises and to the logs, accounts and records in any way relating to the same. As soon as practicable after the close of each month the second party will make full and accurate reports to the first parties as may be required touching all matters in any way connected with this agreement; and like special reports shall be made whenever requested. All such reports shall be verified by some responsible agent of the second party having actual knowledge of the facts.

7. The second party shall deliver to the first parties as produced during the first year twelve and a half per cent (12½%); during the second year thirteen per cent (13%); during the third year thirteen and a half per cent (13½%) and so on, increasing each year one-half of one per cent of all oil or gas produced from the said premises, for first ten years, after which the royalty interest shall be twenty per cent (20%) during the remainder of this lease or any extension thereof, the same being delivered free of cost in storage tank or pipe line connected with the wells on said premises; or at the option of the first parties such deliveries may at any time or from time to time be commuted into cash at the market price for crude oil at the wells then prevailing in the field where the premises are situated.

8. The privilege hereby granted to the second party shall not include the exclusive right of possession or use of the surface or other portions of said lands, but only such as are necessary for the prosecution of the undertakings aforesaid. The second party shall at all times so conduct his operations as to interfere as little as practicable with the full use and enjoyment of the surface of said lands and other portions

thereof not required for the purposes of this agree-
56 ment. Whenever requested by the first parties, the second party shall bury all oil, gas and water lines. At the termination of this agreement the second party will remove all refuse and obstructions of every kind from said premises, and restore said premises as nearly as practicable to their original conditions. No casings, however, shall be removed from any producing well, nor from any wells of water suitable for use which may be developed upon said premises, except such second or outer casing as may be removed without impairing the efficiency of the well.

9. No cessation of operations nor any delays in operation by the second party shall be excused unless the same shall be immediately reported to the first parties. All such notices shall be given to the agent of the first parties, and in each case of cessation or delays shall be accompanied with a full and particular statement of the causes and circumstances deemed to justify or excuse the same.

10. No assignment of this agreement, or any part thereof, nor any grant or transfer of rights arising under the same, may be made by the second party unless in writing, and with the written consent and approval of the first parties.

11. This agreement is made subject to all existing easements or rights of way in said lands, and subject to the laws of Wyoming authorizing future grants of easement or rights of way. The second party shall observe the laws of Wyoming and conform to the same in all his operations under this agreement.

12. In the event that the second party shall make default in the performance of the conditions of this agreement on his part, the first parties may at their option terminate the same forthwith. All notices which may be required to be given under this agreement to the second party may be effectually given by mail to the address set forth at the beginning of this agreement.

13. All controversies which may arise between the parties concerning the meaning or effect of this agreement, or the rights of the parties under the same, shall, at the request of either party, be submitted to arbitration, each party appointing an arbitrator and these two if necessary, an umpire.

The award of the board of arbitrators shall be final and binding upon the parties. Either party will, on ten days' notice, appoint an arbitrator, and the arbitrators shall meet within ten days after appointment and complete the organization of the Board of Arbitration, and make their award in writing within thirty days after appointment. This provision shall not deprive the first parties of the remedy of injunction.

14. The parties of the first part will appoint an agent resident of Wyoming to whom the notices and communications required by this agreement to be made by the second party shall be given.

In Witness Whereof the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused these presents to be executed by its President and Secretary, the day and year first above written.

That the foregoing stipulation of facts was all of
57 the evidence given or offered on the trial of said cause.

Whereupon the plaintiff moved for judgment in favor of the plaintiff on the pleadings and proofs, which said motion was and is in words and figures as follows, to-wit:

Motion of Plaintiff for Judgment on Pleadings and Proofs.

The plaintiff upon the submission of the above-entitled cause to the Court moves the Court upon the pleadings and the evidence for judgment in favor of the plaintiff and against the defendant for the amounts claimed in the petition with interest and costs.

Dated January 7, 1932.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

Whereupon defendant moved for judgment in favor of defendant, which said motion was and is in words and figures as follows, to-wit:

Motion for Judgment in Favor of Defendant.

Comes now Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the defendant above named, at the conclusion of all of the evidence introduced upon behalf of plaintiff and defendant, and moves the Court for judgment in favor of the said defendant and against the plaintiff, dismissing plaintiff's petition with costs to said defendant.

Dated this 7th day of January, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

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58 The Court then made and entered an order taking said case under advisement and allowing plaintiff ten days for filing brief and allowing defendant ten days thereafter for filing defendant's brief and allowing plaintiff five days thereafter for filing plaintiff's reply brief, which said order was and is in words and figures as follows, to-wit:

Trial to Court and Case Taken Under Advisement.

At this day comes the plaintiff by N. E. Corthell, Esquire, his attorney, and the defendant, by John R. Wheeler, Esquire, Special Attorney for the United States Bureau of Internal Revenue, and Albert D. Walton, Esquire, United States Attorney for the District of Wyoming, also comes. And this case comes on now to be tried to the Court without a jury, pursuant to a written stipulation thereto heretofore filed herein.

Thereupon it is announced by counsel in open court that all evidence in this case will be in the form of written stipulation of facts herein filed.

Thereupon counsel for plaintiff announces he desires to file motion for judgment for plaintiff and permission therefor is granted by the Court, and thereupon plaintiff files motion

for judgment herein. Also, counsel for defendant state that they desire to file motion for judgment for defendant and, permission being granted by the Court, the defendant thereupon files motion for judgment herein.

This case is thereupon argued to the Court by the attorneys for the parties hereto and is by the Court taken under advisement.

It is ordered by the Court that plaintiff be, and he is hereby, allowed ten days from and after this date within which to file and serve his brief; defendant is allowed ten days thereafter within which to file and serve his brief, and plaintiff is allowed five days thereafter within which to file and serve reply brief.

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59 Be it further remembered that on the 7th day of April, A. D. 1932, the Court handed down a Judge's Memorandum holding and deciding as follows, to-wit: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases."

Be it further remembered that on the 7th day of April, A. D. 1932, an order was duly entered granting counsel thirty days from April 7, 1932, within which to submit judgment to the Court for approval, which said order was and is in words and figures as follows:

Order Allowing Time to Submit Judgment.

The Court having this day filed a memorandum opinion herein on the trial of this case, it is now ordered by the Court that thirty days from and after this date be, and the same are hereby, allowed within which the attorneys for the parties hereto may collaborate and submit form of judgment to be entered in this case.

Be it further remembered that on the 7th day of May, A. D. 1932, an order was duly entered enlarging the time to and including May 14, 1932, for counsel to prepare and sub-

mit judgment for the Court's approval, which said order was and is in words and figures as follows, to-wit:

Order Enlarging Time to Prepare and Enter Judgment.

The above-entitled matter coming on to be heard this day upon motion made in open court by Albert D. Walton, United States Attorney for the District of Wyoming, attorney for the defendant, for an order enlarging the time heretofore granted within which to prepare and enter judgment herein, and good cause being shown therefor:

It is hereby ordered that the time within which the
60 judgment in the above-entitled cause may be prepared and entered herein be, and the same is hereby, enlarged to and including the 14th day of May, A. D. 1932.

Dated this 7th day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that thereafter and on the 13th day of May, A. D. 1932, a judgment was entered in favor of the plaintiff and against the defendant, which said judgment was and is in words and figures as follows, to-wit:

Judgment.

This cause having heretofore come on to be heard
61 before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury, and the plaintiff having appeared by N. E. Corthell, his attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Attorney for the District of Wyoming, his attorneys; and the Court having taken the case under advisement, and having considered the stipulation of facts, and the other evidence, and the admissions made in open court, and having heard the argument of counsel, and being now fully advised:

The Court finds generally for the plaintiff, Richard F. Cooper, and against the defendant, Marshall S. Reynolds, Individually, and as Collector of Internal Revenue, upon the

first cause of action for the sum of Five Thousand Ninety-seven and 77/100 Dollars ($5,097.77) with interest at the rate of 6% per annum from December 29, 1928; upon the second cause of action for the sum of Four Thousand Nine Hundred Eighty-seven and 85/100 Dollars with interest at the rate of 6% per annum from December 29, 1928; upon the third cause of action for the sum of Five Thousand Five Hundred Thirty-one and 28/100 Dollars ($5,531.28) with interest at the rate of 6% per annum from December 29, 1928; upon the fourth cause of action for the sum of Three Thousand Nine Hundred Seventy-three and 22/100 Dollars ($3,973.22) with interest at the rate of 6% per annum from December 29, 1928; and upon the fifth cause of action for the sum of Four Hundred Thirty-eight and 15/100 Dollars ($438.15) with interest at the rate of 6% per annum from December 15, 1928, and for the further sum of Six Thousand Four Hundred Sixty-five and 27/100 Dollars ($6,465.27) with interest at the rate of 6% per annum from February 13, 1930.

62 It is therefore considered and adjudged by the Court that the plaintiff, Richard F. Cooper, do have and recover from the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the first cause of action the said sum of Five Thousand Ninety-seven and 77/100 Dollars ($5,097.77) together with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the second cause of action the said sum of Four Thousand Nine Hundred Eighty-seven and 85/100 Dollars ($4,987.85) together with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the third cause of action for the said sum of Five Thousand Five Hundred Thirty-one and 28/100 Dollars ($5,531.28) with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the fourth cause of action for the said sum of Three Thousand Nine Hundred Seventy-three and 22/100 Dollars ($3,973.22) with interest thereon at the rate of 6% per annum from December 29, 1928; and upon the fifth cause of action for the said sum of Four Hundred Thirty-eight and 15/100 Dollars ($438.15) with interest thereon at the rate of 6% per annum from December 15, 1928, and the further sum of Six Thousand Four Hundred Sixty-five and 27/100 Dollars with interest at the rate of 6% per annum

from February 13, 1930; together with the costs of the action to be taxed.

To which finding and judgment and each and every portion thereof the defendant excepted at the time; and the defendant is hereby allowed sixty days within which to prepare and file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collection of the income taxes for the recovery of which this action was brought.

Done in open court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

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63 Be it further remembered that on the 9th day of July, A. D. 1932, a motion was filed on behalf of the defendant for an extension of time within which to prepare and file his bill of exceptions and submit the same to the Court for approval, which said motion supported by affidavit of Albert D. Walton, of counsel for defendant, was and is in words and figures as follows, to-wit:

Motion for Further Extension of Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

Comes now the defendant above named by Albert D. Walton, United States Attorney for the District of Wyoming, and moves the Court for an order further enlarging the time within which defendant may prepare and file bill of exceptions and present same to the Court for allowance to and including the 10th day of September, A. D. 1932.

This motion is based upon the affidavit of Albert D. Walton hereto attached and made a part hereof.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,
Attorney for Defendant.

Affidavit.

United States of America, District of Wyoming, State of Wyoming, County of Laramie—ss.

Albert D. Walton, being first duly sworn according to law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is the attorney for the defendant in the above entitled cause; that a judgment was entered against the defendant in the above entitled cause on the 13th day of May, A. D. 1932, and that in and by said judgment as entered the defendant was given sixty days from and after date of entry within which to prepare and file a bill of exceptions and present the same to the Court for allowance; that immediately upon the entering of said judgment affiant notified the Attorney General of the United States that judgment had been entered against the defendant in said cause, and sent a copy of said judgment to the said Attorney General, and requested advice as to whether appeal would be taken; that up to the date hereof, to-wit, July 9, 1932, the Attorney General has not advised affiant as to whether
64 an appeal is to be taken in said cause; that owing to the fact that affiant has been busily engaged in the work connected with the office of the United States Attorney for the District of Wyoming since May 13, 1932, he has not had the opportunity to prepare said bill of exceptions, and owing to the business of said office now pending before said Court for disposition, affiant will be unable to prepare said bill of exceptions within the time allowed by the provisions of said judgment, but will be able to prepare, file, and present to the Court for allowance said bill of exceptions on or before September 10, 1932.

ALBERT D. WALTON.

Subscribed and sworn to before me this 9th day of July, A. D. 1932. (Seal) Clara H. Ahrens, Notary Public. My Commission expires February 5, 1934.

Be it further remembered that on the 9th day of July, A. D. 1932, an order was duly entered by the Court extending the time for defendant to prepare and file his bill of exceptions herein and present the same to the Court for approval, which said order was and is in words and figures as follows, to-wit:

Order Further Extending Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

The above entitled matter coming on to be heard this day upon the motion of the defendant praying for an order further extending the time within which defendant may prepare and file his bill of exceptions herein and present same to the Court for allowance, and good cause being shown therefor:

It is hereby ordered that the time within which the defendant may prepare and file his bill of exceptions herein and present the same to the Court for allowance be, and the same hereby is enlarged and extended to and including the 10th day of September, A. D. 1932.

Dated this 9th day of July, A. D. 1932.

T. BLAKE KENNEDY, Judge.

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65 Be it further remembered that on the 1st day of September, A. D. 1932, a motion was made and filed by the defendant in the above entitled cause praying that an order nunc pro tunc be entered overruling defendant's motion for judgment and sustaining plaintiff's motion for judgment, in accordance with the Judge's Memorandum handed down on the 7th day of April, A. D. 1932, which said motion was and is in words and figures as follows, to-wit:

Motion for Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiff's Motion for Judgment.

Comes now Marshall S. Reynolds, Individually and as Collector of Internal Revenue, and moves the Court that an order nunc pro tunc be entered herein overruling defendant's motion for judgment made and filed on the 7th day of January, A. D. 1932, and sustaining plaintiff's motion for judgment made and filed on the 7th day of January, A. D. 1932, effective as of date May 13, A. D. 1932, in accordance with the Judge's Memorandum handed down and dated on the 7th day of April, A. D. 1932, for the reason and upon the ground that through inadvertence such an order has not

been entered, nor did the judgment entered herein include the ruling upon said motions.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,
Attorney for Defendant.

Be it further remembered that on the 1st day of September, A. D. 1932, an order nunc pro tunc overruling the defendant's motion for judgment and sustaining plaintiff's motion for judgment was duly entered herein, which said order nunc pro tunc was and is in words and figures as follows, to-wit:

Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiff's Motion for Judgment.

66 The above entitled matter coming on to be heard this day upon the motion of the defendant above named praying that an order nunc pro tunc be entered overruling the defendant's motion for judgment and sustaining plaintiff's motion for judgment, pursuant to the Judge's Memorandum handed down herein on the 7th day of April, A. D. 1932, and it appearing to the Court that in the said Judge's Memorandum the Court held and decided: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases."

And it further appearing to the Court that a judgment was entered in the above entitled case on the 13th day of May, A. D. 1932, in favor of the plaintiff and against the defendant, but through inadvertence the said judgment did not contain a provision sustaining plaintiff's motion for judgment and overruling the defendant's motion for judgment:

It is, therefore, ordered that the motion of the plaintiff for judgment herein filed on the 7th day of January, A. D. 1932, be, and the same hereby is, sustained, to which said ruling the defendant duly excepts, and that the motion of

the defendant for judgment in favor of the defendant filed on the 7th day of January, A. D. 1932, be, and the same hereby is, overruled and denied, to which said ruling the defendant duly excepts.

It is further ordered that this order be, and the same hereby is, effective from and after the 13th day of May, A. D. 1932, the date upon which judgment was entered in the above entitled cause.

Dated this 1st day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

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67 It is hereby stipulated and agreed by and between the parties hereto that the above and foregoing which is tendered by the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, as his bill of exceptions in the above-entitled cause, contains a full, true and correct statement of the evidence introduced in said cause, and a full, true, and correct statement of all of the proceedings in the trial and disposition of said cause, and the exceptions of the defendant had and taken in such proceedings, and that said tendered bill of exceptions may be approved, allowed, settled, and sealed as the bill of exceptions in this cause.

Dated this second day of September, A. D. 1932.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Order of Court Approving and Settling Bill of Exceptions.

Filed Sept. 2, 1932.

On this 2 day of September, A. D. 1932, and within
68 the time allowed by the order of this Court heretofore duly made and entered, the defendant Marshall S. Reynolds, Individually and as Collector of Internal Revenue, tendered his bill of exceptions herein, together with a stipulation of counsel that the same might be approved, allowed and settled as the bill of exceptions in this cause:

And the Court, having duly considered and examined said bill of exceptions, and it being found that the exceptions are therein truly alleged, the same is by the Court hereby allowed, settled and approved and said bill of exceptions is hereby signed and sealed by the Honorable T. Blake Kennedy, the Judge of said Court before whom said proceedings were had, and the same is ordered by the said Court to be filed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Judge before whom said proceedings were had this 2 day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Election as to Printing Transcript.

Filed Sept. 13, 1932.

Comes now the above named defendant and appellant
69 and hereby elects to have the printing of the transcript on appeal in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 12th day of September, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant-Appellant.

Stipulation for Transcript.

Filed Sept. 13, 1932.

It is hereby stipulated and agreed by and between
70 the parties to the above entitled cause that the following portion of the record shall be included in the transcript, to-wit:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of Errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulation as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

This stipulation.

Praecipe for transcript.

Clerk's certificate.

71 It is further stipulated that the above is without prejudice to either party to have any other portions of the record certified up if it should be necessary.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue.

Attorneys for Defendant.

Praecipe for Transcript.

Filed Sept. 13, 1932.

To the Clerk of said Court:

72 You are hereby requested and directed to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulatio as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

Stipulation as to transcript.

Praecipe for transcript.

Clerk's certificate.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant-Appellant.

[Clerk's Certificate.]

United States of America, District of Wyoming—ss.

73 I, Charles J. Ohnhaus, Clerk of the District Court of the United States within and for the District of Wyoming, do hereby certify the above and foregoing to be a true, correct and complete transcript and copy of the record and proceedings, and of all thereof, as called for by the praecipe for transcript filed herein, including the Judge's Memorandum, in a certain cause lately in said Court pending, between Richard F. Cooper, Plaintiff, and Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant, as full and complete as the same still remains on file and of record in my office at Cheyenne, Wyoming.

In witness whereof, I do hereunto sign my name and affix the seal of said Court at Cheyenne, in said District, this 15th day of September, A. D. 1932.

(Seal)

CHARLES J. OHNHAUS,
Clerk, United States District Court,
District of Wyoming.

Filed Sept. 21, 1932. Albert Trego, Clerk.

Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the January term, 1933, of said court, before the Honorable John H. Cotteral, Circuit Judge, the Honorable George T. McDermott, Circuit Judge, and the Honorable Tillman D. Johnson, District Judge.

Be it remembered that heretofore, to wit, on the 21st day of September 1932, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Marshall S. Reynolds, individually and as collector of internal revenue, was appellant, and Richard F. Cooper was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit under the supervision of its clerk, is in the words and figures following, to wit:

71 And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz

Appearances

For appellant:
The clerk will enter my appearances as counsel for the appellant.

ALBERT D. WALTON,
U. S. Attorney, Dist. of Wyoming, Cheyenne, Wyo.
EWING T. KERR,
Asst. U. S. Attorney, Dist. of Wyoming, Cheyenne, Wyo.
JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue, Seattle, Wash.

Filed Sept. 24, 1932. Albert Trego, clerk.

The clerk will enter my appearance as counsel for the appellant.

ELDON O. HANSON,
Bureau of Internal Revenue, Washington, D.C.

Filed Jan. 9, 1933. Albert Trego, clerk.

72 For appellee:
The clerk will enter my appearance as counsel for the appellee.

N. E. CORTHELL, *Laramie, Wyo.*

Filed Sept. 24, 1932. Albert Trego, clerk.

Order of submission

No. 747, No. 748, No. 749

Second day, January term, Tuesday, January 10th, A.D. 1933

Before Honorable John H. Cotteral, Circuit Judge; Honorable George T. McDermott, Circuit Judge, and Honorable Tillman D. Johnson, District Judge.

These causes came on to be heard, and by agreement of counsel, were argued together, Eldon O. Hanson, Esquire, appearing for appellant, and N. E. Corthell, Esquire, appearing for appellees.

On motion, appellant was granted leave to file twenty printed copies of a reply brief herein instanter, which was accordingly done. Appellant was also granted leave to file twenty printed copies of a supplemental reply brief within five days, appellees to file twenty printed copies of a supplemental brief in reply thereto within fifteen days thereafter.

Thereupon these causes were submitted to the court.

73 United States Circuit Court of Appeals, Tenth Circuit

No. 747—January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER, APPELLEE

No. 748—January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

BARBARA V. COOPER, APPELLEE

No. 749—January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER AND BARBARA V. COOPER, APPELLEES

[April 3, 1933]

Eldon O. Hanson, special attorney, Bureau of Internal Revenue (Albert D. Walton, U.S. attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, John R. Wheeler, special attorney, Bureau of Internal Revenue, and Percia E. Miller, special attorney, were with him on the brief), for appellant.

N. E. Corthell (A. W. McCullough and M. E. Corthell were with him on the brief) for appellees.

Before COTTERAL and MCDERMOTT, Circuit Judges, and JOHNSON, District Judge.

MCDERMOTT, Circuit Judge, delivered the opinion of the court.

Appellees are the beneficiaries of a trust set up by the will of their father. A part of the trust estate consists of a royalty interest under an oil and gas lease on lands in Wyoming, the lease running from the father, the owner of the oil reserves. Appellees returned

for income-tax purposes the royalties received by them during the years 1923 to 1927, both inclusive. The trustees filed an information return only; the beneficiaries claimed the deduction for depletion, in an amount conceded to be reasonable, allowed by § 214(a) 10, Rev. Act of 1921, and the corresponding sections in the Revenue Acts of 1924 and 1926. The claim was disallowed in its entirety, the Commissioner taking the position that since the legal title stood in the name of the trustees, with directions to convert into cash at their discretion, appellees had no present or reversionary interest in the mineral estate, and were therefore not entitled to any depletion allowance. The tax was paid under compulsion and protest, and this action brought to recover it. A jury was waived; the facts stipulated; the plaintiffs recovered, Judge Kennedy filing a memorandum opinion in which he took the common-sense view that the trustees were but conduits through which the income passed in its journey from the oil fields of Wyoming to the appellees. Cooper *v.* Reynolds (D.C.Wyo.), 60 F. (2d) 650.

The question presented is whether a beneficial interest in oil in place will support a claim for depletion or whether the taxpayer must be vested with a present or reversionary interest in the legal title. It is true that the legal title vested in the trustees; it is true they were directed, at a time to be selected by them, to convert the interest into cash. But it is likewise true that, during the years in question, appellees were entitled to the undiminished income from the trust, and upon conversion in their lifetime, to share in the distribution of the proceeds. No one else has any beneficial interest in the royalties producing the taxable income; no one else has or claims any depletion allowance for the capital investment returned by way of such royalties. The question therefore is, Is depletion confined to those who hold a technical legal title?

The answer is found in the decisions of the Supreme Court of the United States and of other courts. Depletion allowances are not dependent upon technical questions of title; they rest upon a broader base. If the taxpayer has an economic interest which is adversely affected by the production of oil, he may deduct depletion from the income received from that oil. Lynch *v.* Alworth-Stephens Co., 267 U.S. 364; Weiss *v.* Weiner, 279 U.S. 333; Palmer *v.* Bender, 287 U.S. 551. In the latter case the taxpayer had assigned his lease, reserving only an overriding royalty.[4] In the cases at bar appellees were entitled not only to the royalty but to share in the proceeds of a sale if made in their lifetime. Equitable estates are not barred by either the statute or decisions. Commissioner *v.* Molter (C.C.A. 10) 60 F (2d) 498; Merle-Smith *v.* Commissioner (C.C.A. 2) 42 F. (2d) 837, certiorari denied, 282 U.S. 897. In the latter case the equitable interest was subject to extinction, but the taxpayer was held entitled to depletion while the interest lasted. To the same effect see Kuhn *v.* Commissioner, 24 B.T.A. 216; Alphin *v.* Commissioner, 21 B.T.A. 1101.

The decision of the Supreme Court of the United States in Anderson *v.* Wilson, — U.S. — (decided March 13, 1933) is cited by the appellant as opposed. There, as here, the legal title to the properties was in testamentary trustees; there, as here, the taxpayer was the beneficiary of the trust. The loss there was a capital loss arising from the sale of real estate by the trustees. It was held that the loss fell upon the trustees and not the beneficiary, and that the trustees were entitled to the deduction in their income-tax return.

There is language in the Anderson case which, taken out of its setting, supports the contention of appellant. The Supreme Court, however, sees no conflict between its opinion in the Anderson case and its opinion in Palmer *v.* Bender, handed down two months earlier, for the Palmer case is not cited, much less overruled. It is neither necessary nor proper for an inferior court to suggest a conflict where the Supreme Court has suggested none, nor, having suggested it, undertake to demonstrate its nonexistence. It may not be impertinent, however, in reply to appellant, to note that there is no irreconcilable inconsistency between the two decisions. One dealt with capital losses, and held that the loss follows the title; the other dealt with depletion of minerals by the production which gave rise to the income, and held that questions of title were not controlling. In one, the trust was a taxpayer, entitled to claim the capital loss; in the other, the trust made no return except for the information of the commissioner.

It will be enough for us to decide which of the two cases controls the cases at bar. Fortunately, that decision is not a difficult one. The Palmer case deals with the identical statute with which we are confronted. It deals with the depletion of oil reserves, as do our cases. In the Palmer case, the taxpayer had no title either to the lease or the real estate; all he had was a contractual right to receive a part of the oil produced under a lease owned by another, from real estate owned by a third. In our cases, the taxpayers have a testamentary right to receive a part of the oil produced under a lease owned by others—the trustees—plus a right to share in the proceeds of the royalty when and if sold. The legal questions presented are identical, except in so far as the appellee's case here is strengthened by their reversionary right. In the Palmer case the court declined to consider refinements of title. The court said:

"It has been elaborately argued at the bar and in the briefs whether under Louisiana law the two instruments are assignments or subleases. We do not think the distinction material. Nothing in § 214 (a) (10) indicates that its application is to be controlled or varied by any particular characterization by local law of the interests to which it is to be applied. . . . The formal attributes of those instruments or the descriptive terminology which may be applied to them in the local law are both irrelevant."

The court then considered whether the depletion statute was confined to any form of legal ownership, and gave its answer in these words:

"The allowance to the taxpayer is not restricted by the words of the statute to cases of any particular class or to any special form of legal interest in the oil well. . . . The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital. That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this court in Lynch *v.* Alworth-Stephens Co., 267 U.S. 364. . . . Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough, if by virtue of the leasing transaction, he has retained a right to share in the oil produced. If so, he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. . . . Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case."

This considered language, dealing with the particular statute here involved, is broad and unmistakable. The decision itself allowed depletion to one who had much less economic interest in the oil reserves than the appellees here. In the cases at bar, unlike the Anderson case, it is not a question of which taxpayer gets the allowance; in our cases, the depletion actually suffered by the royalty interest must be allowed to appellees or no allowance therefor made. We cannot ignore the Palmer case because of a supposed conflict between it and a later case dealing with another statute.

The Palmer case and its progenitors do no more than apply to a new situation the accepted philosophy that taxation is an intensely

practical matter, and questions must be determined according to the truth and substance of the transaction, and not by the form it took. Eisner *v.* Macomber, 252 U.S. 189; United States *v.* Phellis, 257 U.S. 156; Bowers *v.* Kerbaugh Emp. Co., 271 U.S. 170. The law recognizes equitable estates for the purpose of paying income taxes, Irwin *v.* Gavit, 268 U.S. 161; Anderson *v.* Wilson, supra; likewise it should and does recognize them for proper deductions from that income. The allowance claimed here was essentially just, for every barrel of oil produced lessened the eventual sale price of the property in which appellees may share; such production in fact depleted the reservoir of oil in which appellees had a substantial economic interest.

There is a subsidiary point of minor evidence in no. 748. John Hartshorn Cooper, a brother of Barbara V. Cooper and one of the beneficiaries of the trust created by their father's will, died in 1921. Barbara inherited part of her brother's interest in the royalties in question. His estate was closed on September 13, 1923. The estate was therefore the taxpayer until September 13, 1923, and Barbara was the taxpayer after that date. Bankers' Trust Co. *v.* Bowers (C.C.A. 2), 295 F. 89; Hoeper *v.* Tax Commission, 284 U.S. 206. The Commissioner apportioned the 1923 income between the two taxpayers according to the number of days included in each of the periods in question. The propriety of such method of apportionment if the Commissioner is unable to determine the actual income received by each of the taxpayers is not questioned. On the other hand, the Commissioner should assess the income actually received by each of the taxpayers if it can be ascertained. Rules of thumb should only be resorted to in case of necessity, for the actual is always preferable to the theoretical. Doyle *v.* Mitchell Brothers Co., 247 U.S. 179, 187; Howbert *v.* Penrose (C.C.A. 10), 38 F. (2d) 577.

The point in disagreement is whether the record discloses that the Commissioner erred in resorting to an apportionment—that is, was the actual income of each taxpayer readily ascertainable? The record is not entirely satisfactory on the point, but the petition alleges that the Commissioner added to the appellee's taxes for the year 1923 the difference between the income actually received by her and the amount which would have been received by her if the income for the entire year had been prorated according to the calendar. This allegation is expressly admitted by the answer. The stipulation of facts recites that for the year 1923 the Commissioner's determination rested in part upon the "difference between the actual gross receipts as returned by the plaintiff and the gross receipts as determined by the Commissioner by apportionment." In addition to the pleadings and the stipulation of facts, it is a matter of common knowledge that a record is kept of oil runs, both by the producing companies and by the pipe-line purchasers as the oil is marketed. From these records a close approximation can be had as to the amount of production in any period of time. Furthermore, in all human probability, the trustees of this estate kept an accurate

record of disbursements made by them to the estate of John Hartshorn Cooper, as well as an accurate record of the disbursements made to Barbara V. Cooper. We therefore conclude that there is substantial evidence in the record to support the finding of the trial court on this question of fact.

Appellant filed a supplemental reply brief upon the question of interest, the contention being that because of section 319 of the Economy Act of June 30, 1932, the interest on this judgment should be reduced from 6 percent to 4 percent, at least after the effective date of the Economy Act. Huwe v. Ohmer Fare Register Company (C.C.A. 6), 61 F. (2d) 721; Caraleigh Phosphate & Fertilizer Works *v.* United States (Ct.Cl.), 1 F. Supp. 854. The point passes out of the case by virtue of section 2 of the First Deficiency Act of January 30, 1933. Title 2, § 2, of that act provides that "Section 319 of the act of June 30, 1932, shall not apply to any judgment rendered against the United States prior to July 1, 1932."

The judgments are affirmed.

74 *Judgment*

Thirty-seventh Day, January term, Monday, April 3rd, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Motion to stay mandate

Comes now Marshall S. Reynolds, individually, and as collector of internal revenue, appellant in the above-entitled cause, and moves for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for a period of thirty (30) days, pending an application to the Supreme Court of the United States for a write of certiorari.

Dated this 2nd day of May, A.D. 1933.

ALBERT D. WALTON,
United States Attorney
for the District of Wyoming,

75 EWING T. KERR,
Asst. United States Attorney
for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Appellant.

Filed May 3, 1933. Albert Trego, clerk.

Order

Thursday, May 4th, A.D. 1933

Before Honorable Robert E. Lewis, Senior Circuit Judge, at Denver, Colorado, the following proceedings were had:

This cause came on to be heard on the motion of appellant for a stay of the mandate herein.

On consideration whereof, and for good cause shown, it is now here ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, and stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

76 *Motion to stay mandate*

Comes now Marshall S. Reynolds, individually and as collector of internal revenue, appellant in the above-entitled cause, and moves the court for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for an additional period of thirty days, pending an application to the Supreme Court of the United States for a writ of certiorari. This motion is based upon the affidavit of Albert D. Walton, which is hereto attached and made a part hereof.

Dated this 2nd day of June, A.D. 1933.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,
EWING T. KERR,
Asst. United States Attorney for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Appellant.

Filed June 3, 1933. Albert Trego, clerk.

77 *Order*

No. 747, No. 748, No. 749

Twentieth day, April term, Saturday, June 3d, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges.

These causes came on to be heard on the motion of appellant for a further stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days

from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

78 *Clerk's certificate*

United States Circuit Court of Appeals, Tenth Circuit

I, Albert Trego, clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Wyoming, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals wherein Marshall S. Reynolds, individually and as collector of internal revenue, was appellant and Richard F. Cooper was appellee, No. 747, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit at office in the city of Denver, Colorado, this 20th day of June, A.D. 1933.

[SEAL] ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals,
Tenth Circuit.

U.S. GOVERNMENT PRINTING OFFICE: 1933

81 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for argument immediately following no. 225.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 748

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, APPELLANT,

vs.

BARBARA V. COOPER, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

FILED SEPTEMBER 21, 1932.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

Pleas and Proceedings before The Honorable T. Blake Kennedy, Judge of the United States District Court for the District of Wyoming, presiding in the following-entitled cause:

BARBARA V. COOPER, Plaintiff,

Law vs. No. 2063

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, Defendant.

Be it remembered, that heretofore, and on, to-wit,
1 the 15th day of January, A. D. 1931, came Barbara V. Cooper, Plaintiff, by Corthell, McCullough and Corthell, her attorneys, and filed in said Court a petition against Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant.

The said petition is in words and figures, as follows, to-wit:

Petition.

I.

First Cause of Action.

For the first cause of action against the defendant,
2 the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the 14th day of March, 1924, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming her return of taxable income for the calendar year 1923. The lawful tax upon said return was paid by the plaintiff to the defendant in full. Thereafter, to-wit, on the 1st day of November, 1928, the plaintiff made and filed with said Collector her amended return of taxable income for the calendar year 1923.

2. In said amended return the plaintiff included the sum of $455.00, among other sums, as income from fiduciaries, being the distributive share accruing to and received as income by the plaintiff, as one of the devisees under the will of John Hartshorn Cooper (deceased in 1921), and representing one-half the distributive share accruing to said John Hartshorn Cooper, from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the will of A. F. T. Cooper, deceased.

3. The right and interest of the plaintiff with respect to which the said distributive share accrued, as aforesaid, to the plaintiff, as devisee of John Hartshorn Cooper, deceased, was derived under the following provisions of the will and
3 codicil thereto of said A. F. T. Cooper, deceased, to-wit:

(Extract from original Will of A. F. T. Cooper:)

"14. I give, devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell, call in, collect and convert into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession, unless it shall appear to my trustees that an earlier sale shall be beneficial), and so that they shall have the fullest power and discretion to postpone the sale, calling in, and conversion of the whole or any part or parts of the said premises during such period as they shall think proper, and to retain the same or any part thereof in its present form of investment without being responsible for loss, and shall out of the moneys to arise from such calling in or conversion, pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this will or any codicil hereto, and make provision for the duty on any legacies or annuities bequeathed free of duty, and shall hold the residue of such moneys after payment of legacy duty thereon—"

(Extract from Codicil of provision superseding residue of said paragraph 14 of original Will:)

> "Upon trust as to the first twenty one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper, the sum of seven thousand pounds to my son John Hartshorn Cooper, and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate, and as to the residue (if any) thereof, upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely, and as to one-fourth part or share for my said son John Hartshorn Cooper absolutely, and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper, but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and an-
4 nuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1923 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1923, consisting of royalties under the said lease and interest on funds in their hands, in the manner following, to-wit: the receipts accruing on and after September 13th, 1923, in the proportion of one-eighth to the plaintiff, and one-eighth to Richard F. Cooper, as devisees under the will of John Hart-

shorn Cooper, deceased, one-half to said Richard F. Cooper, and one-fourth to the plaintiff, or to her use, under the provisions of the will and codicil of said A. F. T. Cooper, deceased.

5. The said trustees in March, 1924, made and filed with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $908.08 derived from interest on funds in the hands of the trustees, and gross receipts of $87,240.39 accruing in 1923 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $43,608.67 and taxes and expenses amounting to $7,891.55, leaving as income, of the amount accruing as aforesaid from royalties, $35,740.17, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $36,648.25, from which the said amount of $455.00 returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on December 22nd, 1928, the Commissioner of Internal Revenue determined and assessed against the plaintiff an additional income tax for 1923 in the sum of $303.55. Such determination and assessment was based wholly upon two additions to the gross income returned by the plaintiff as receipts from fiduciaries:

a—An addition representing a proportional part of the deduction for depletion claimed by the plaintiff, in accordance with the return of the trustees, and disallowed by the Commissioner.

b—An addition representing the difference between
5 the amount distributable from the receipts actually accrued of the trustees during the period from September 13th to December 31st, 1923, inclusive, and the amount which would have been distributable from the receipts constructively accrued for the said period, if the accruals for the entire year were prorated according to the number of days in the calendar year 1923 prior to September 12th and subsequent thereto.

The aggregate of such additional amounts was $2,568.38.

Such disallowance of depletion and addition to income on account thereof were made under the asserted claim of the

Commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said Commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom during the said period from September 13th to December 31st, 1923, inclusive; and such addition to income, based upon such proration of receipts during the year 1923, was based upon the wrongful disregard by the Commissioner of all the evidence presented and of the facts known to the Commissioner with respect to the actual receipts during the said period.

7. Thereafter, to-wit, on March 14, 1929, the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon amounting to $96.08, making a total of $399.63, and threatened to enforce such payment by distress upon the plaintiff's property, whereupon, under compulsion and protest and involuntarily and to prevent such distress, the plaintiff, on June 19, 1929, paid to the defendant the said sum of $399.63.

8. The plaintiff alleges that the disallowance of said deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining her net income; and that the additional tax determined and assessed against the plaintiff, based
6 on the disallowance of such deduction, was unauthorized and unlawful. The plaintiff further alleges that the addition to income, based on the proration of receipts during the year 1923, as aforesaid, was unauthorized and unlawful, except as hereinafter stated; that the plaintiff's amended return was correctly made on the basis of actual receipts; that such return and all the evidence and all the facts known to the Commissioner were wrongfully disregarded in making such addition; and that the additional tax determined and assessed against the plaintiff, based on such wrongful addition, was unauthorized and unlawful, except as to the sum of $116.50. The plaintiff, therefore, alleges that on, to-wit, the 19th day of June, 1929, the defendant, in manner aforesaid, became and was indebted to the plaintiff for moneys then had and received by the defendant from the plaintiff, to

the use of the plaintiff, in the sum of $283.13, which said sum was then and there due and payable from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on September 14, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $283.13, with interest thereon, upon the grounds aforesaid, and demanded payment thereof, and, thereafter, to-wit, on the 31st day of October, 1930, such application and demand were refused.

II.

Second Cause of Action.

For a second cause of action against the defendant, the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the 26th day of August, 1926, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming her return of taxable income for the calendar year 1925. The lawful tax of $1,522.06 upon said return was, on and before December 15, 1926, paid by the plaintiff to the defendant in full. Thereafter, to-wit, on November 1st, 1928, the plaintiff, conforming to a ruling of the Commissioner of Internal Revenue, made and filed with the Commissioner her
7 amended return of taxable income for the calendar year 1925, the lawful tax upon which was $986.15.

2. In said amended return the plaintiff included, with other items, the sum of $7,670.86 as income from fiduciaries, being the distributive share accruing to and received as income by the plaintiff, as one of the devisees under the will of John Hartshorn Cooper (deceased in 1921), and representing one-half of the distributive share accruing to said John Hartshorn Cooper from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the will of A. F. T. Cooper, deceased.

3. The right and interest of the plaintiff with respect to which the said distributive share accrued, as aforesaid, to the plaintiff, as devisee of John Hartshorn Cooper, deceased, was derived under the following provisions of the will and codicil thereto of said A. F. T. Cooper, deceased, to-wit:

(Extract from original will of A. F. T. Cooper:)

"14. I give devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees Upon trust that my trustees shall sell call in collect and convert into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to arise from such calling in or conversion pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon—"

(Extract from codicil of provision superseding residue of said paragraph 14 of original will:)

"Upon trust as to the first twenty-one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper the sum of seven thousand pounds to my son John Hartshorn Cooper and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate and as to the residue (if any) thereof upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely and as to one-fourth part or share for my
8 said son John Hartshorn Cooper absolutely and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper but so that such last men-

tioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1925 the residuary clause of said codicil was operative; and the trustees distributed the receipts of 1925, consisting of royalties under the said lease and interest on funds in their hands, in the manner following, to-wit: one-half thereof to Richard F. Cooper in his own right, and one-eighth thereof to Richard F. Cooper, and one-eighth thereof to the plaintiff herein, as devisees, in equal shares, under the will of John Hartshorn Cooper, deceased, and one-fourth to the plaintiff, or to her use, all under the provisions of the will and codicil of said A. F. T. Cooper, deceased.

5. The said trustees in March, 1926, made and filed with the Collector of Internal Revenue, a fiduciary information return, only. The income shown on said return consisted of $424.26 derived from interest on funds in the hands of the trustees, and gross receipts of $102,016.69 accruing in 1925 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $34,759.43 and taxes and expenses amounting to $6,314.62, leaving as income, of the amount accruing as aforesaid from royalties, $60,942.64, which, together with the amount accruing,
9 as aforesaid, from interest, aggregated net income of $61,366.90, from which the said amount of $7,670.86

returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on the 25th day of February, 1929, the Commissioner of Internal Revenue determined against the plaintiff an additional income for 1925 in the sum of $4,344.93. Such determination was based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and such additional income represented such proportion of the deductions for depletion on the fiduciary return as was applicable to the plaintiff's distributive share, as devisee of John Hartshorn Cooper, deceased. Such disallowance of depletion and addition to income were made under the asserted claim of the Commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said Commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1925.

7. The plaintiff alleges that the disallowance of such deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining her net income. The plaintiff further alleges that the taxable income accruing to the plaintiff for the year 1925 was no other or greater than the income so, as aforesaid, shown on her amended return, and the lawful tax thereon no other or greater than the said sum of $936.15, shown on said return. The plaintiff, therefore, alleges that on, to-wit, the 15th day of December, 1926, the defendant, in manner aforesaid, became and was indebted to the plaintiff for moneys then had and received by the defendant from the plaintiff, to the use of the plaintiff, in the sum of $585.91, which said sum was then and there due and payable from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

8. Thereafter, to-wit, on September 14, 1929, the
10 plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to

refund the said sum of $585.91, with interest thereon, upon the grounds aforesaid, and demanded payment thereof, and, thereafter, to-wit, on the 31st day of October, 1930, such application and demand were refused.

III.

Third Cause of Action.

For a third cause of action against the defendant, the plaintiff alleges the following facts:

1. Heretofore, to-wit, on the 14th day of June, 1927, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming her return of taxable income for the calendar year 1926. The lawful tax of $3,122.76 shown on said return was, on or before December 15, 1927, paid by the plaintiff to the defendant in full, Thereafter, to-wit, on November 1, 1928, the plaintiff, conforming to a ruling of the Commissioner of Internal Revenue, made and filed with the Commissioner her amended return of taxable income for the calendar year 1926, the lawful tax upon which was $1,413.85.

2. In said amended return the plaintiff included, with other items, the sum of $11,573.89, as income from fiduciaries, being the distributive share accruing to and received as income by the plaintiff, as one of the devisees under the will of John Hartshorn Cooper (deceased in 1921), and representing one-half of the distributive share accruing to said John Hartshorn Cooper from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the will of A. F. T. Cooper, deceased.

3. The right and interest of the plaintiff with respect to the said distributive share accrued, as aforesaid, to the plaintiff, as devisee of John Hartshorn Cooper, deceased, was derived under the following provisions of the will and codicil thereto of said A. F. T. Cooper, deceased, to-wit:

(Extract from original will of A. F. T. Cooper:)

> "14. I give devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of

appointment or disposition by will) unto and to the use of my trustees Upon trust that my trustees shall sell call in collect and convert into money the said real and personal estate and premises at such time or times
11 and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to arise from such calling in or conversion pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon—"

(Extract from codicil of provision superseding residue of said paragraph 14 of original will:)

"Upon trust as to the first twenty-one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper the sum of seven thousand pounds to my son John Hartshorn Cooper and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate and as to the residue (if any) thereof upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely and as to one-fourth part or share for my said son John Hartshorn Cooper absolutely and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1926 the residuary clause of said codicil was operative; and the trustees distributed the receipts of 1926, consisting of royalties under the said lease and interest on funds in their hands, in the manner following, to-wit: one-half thereof to Richard F. Cooper in his own right, and one-eighth thereof to
12 Richard F. Cooper, and one-eighth thereof to the plaintiff herein, as devisees, in equal shares, under the will of John Hartshorn Cooper, deceased, and one-fourth to the plaintiff, or to her use, all under the provisions of the will and codicil of said A. F. T. Cooper, deceased.

5. The said trustees in March, 1927, made and filed with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $767.98 derived from interest on funds in the hands of the trustees, and gross receipts of $134,719.81 accruing in 1926 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $38,296.04 and taxes and expenses amounting to $4,600.81, leaving as income, of the amount accruing as aforesaid from royalties, $96,423.77, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $92,590.94, from which the said amount of $11,573.89 returned by the plaintiff as income from said fiduciaries was derived.

6. Thereafter, to-wit, on the 25 day of February, 1929, the Commissioner of Internal Revenue determined against the plaintiff an additional income for 1926 in the sum of $4,786.98. Such determination was based wholly on the disallowance by

the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and such additional income represented such proportion of the deductions for depletion on the fiduciary return as was applicable to the plaintiff's distributive share, as devisee of John Hartshorn Cooper, deceased. Such disallowance of depletion and addition to income were made under the asserted claim of the Commissioner that the plaintiff, as beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said Commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1926.

7. The plaintiff alleges that the disallowance of
13 such deduction for depletion was unauthorized and unlawful; that the plaintiff was entitled to claim and take the benefit of the same in determining her net income. The plaintiff further alleges that the taxable income accruing to the plaintiff for the year 1926 was no other or greater than the income so, as aforesaid, shown on her amended return, and the lawful tax thereon no other or greater than the said sum of $1,413.85 shown on said return. The plaintiff, therefore, alleges that on, to-wit, the 15th day of December, 1927, the defendant, in manner aforesaid, became and was indebted to the plaintiff for moneys then had and received by the defendant from the plaintiff, to the use of the plaintiff, in the sum of $1,708.91, which said sum was then and there due and payable from the defendant to the plaintiff; and that no part of such indebtedness has been paid.

8. Thereafter, to-wit, on September 14, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $1,708.91, with interest thereon, upon the grounds aforesaid, and demanded payment thereof, and, thereafter, to-wit, on the 31st day of October, 1930, such application and demand were refused.

Wherefore, the plaintiff prays judgment against the defendant for the recovery, upon the first cause of action, of the sum of $283.13, with interest thereon from June 19th,

1929; and, upon the second cause of action, of the sum of $585.91, together with interest thereon from December 15th, 1926; and, upon the third cause of action, of the sum of $1,708.91, together with interest thereon from December 15th, 1927—all at the rate of seven per cent (7%) per annum; and for costs, and all other proper relief.

CORTHELL, McCOLLOUGH & CORTHELL,
Plaintiff's Attorneys.

State of Wyoming, County of Albany—ss.

I, N. E. Corthell, being first duly sworn, say I am
14 one of the attorneys for the plaintiff in the above entitled action. I have read the foregoing petition and know the contents thereof and I believe the facts therein stated to be true.

N. E. CORTHELL.

Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1931. (Seal) H. A. Baumbach, Notary Public.

Answer.

Filed March 30, 1931.

Now comes Marshall Reynolds, the defendant, by
15 Albert D. Walton, United States Attorney for the District of Wyoming, and files this his answer to the petition heretofore filed by the plaintiff.

1. Defendant admits the allegations in paragraph 1 of the first cause of action set forth in the petition that on March 14, 1924, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming her federal income tax return for the calendar year 1923; that the tax shown upon said return was paid by the plaintiff to the defendant; but defendant denies that the tax shown upon said return was the lawful tax due upon said return. Defendant admits the allegation in said paragraph 1 that on November 1, 1928, plaintiff made and filed an alleged amended return for the calendar year 1923.

2. Defendant admits the allegation in paragraph 2 of the first cause of action set forth in the petition that in the al-

leged amended return the plaintiff included the sum of $455.00 among other sums, as income from fiduciaries. Defendant, however, denies all other allegations in said paragraph.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the first cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the first cause of action set forth in the petition and demands strict proof of each and every
16 allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the first cause of action set forth in the petition.

6. Defendant admits the allegations in the 1st, 2nd, 3rd and 4th sub-paragraphs of paragraph 6 of the first cause of action set forth in the petition. Defendant further admits the allegation in said paragraph 6 that such disallowance of depletion and addition to income on account thereof were made under the claim of the Commissioner that the plaintiff, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion. Defendant, however, denies each and every other allegation in said paragraph 6 of the first cause of action set forth in the petition.

7. Defendant admits the allegations in paragraph 7 of the first cause of action set forth in the petition that the defendant demanded payment by the plaintiff of such additional tax, together with interest thereon. Defendant, however, denies the allegation that the said interest amounted to $96.08, but on the contrary defendant alleges that the said interest amounted to $83.82, making a total of $387.37. Defendant denies each and every other allegation in said paragraph 7 of the first cause of action set forth in said petition. Defendant, however, alleges that the plaintiff on June 20, 1929, paid to the defendant the said sum of $387.37.

8. Defendant denies the allegations in paragraph 8 of the first cause of action set forth in the petition.

9. Defendant admits the allegations in paragraph 9 of the first cause of action set forth in the petition.

In answer to the second cause of action set forth in plaintiff's petition:

1. Defendant admits the allegations in paragraph 1 of the second cause of action set forth in the petition that on August 26, 1926, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming her federal income tax return for the calendar year 1925; that said return showed a tax of $1,522.06, which was paid by the plaintiff to the defendant in full before December 15, 1926; and that on November 1, 1928, the plaintiff
17 made and filed an alleged amended federal income tax return for the calendar year 1925, which showed a tax of $936.15. Defendant denies all other allegations in said paragraph.

2. Defendant admits the allegations in paragraph 2 of the second cause of action set forth in the petition that in said alleged amended return the plaintiff included, with other items, the sum of $7,670.86, as income from fiduciaries. All other allegations in said paragraph the defendant denies.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the second cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the second cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the second cause of action set forth in the petition.

6. Defendant denies the allegations in paragraph 6 of the second cause of action set forth in the petition.

7. Defendant denies the allegations in paragraph 7 of the second cause of action set forth in the petition.

8. Defendant admits the allegations in paragraph 8 of the second cause of action set forth in the petition.

In answer to the third cause of action set forth in the plaintiff's petition:

1. Defendant admits the allegations in paragraph 1 of

the third cause of action set forth in the petition that on June 14, 1927, the plaintiff made and filed with the Collector of Internal Revenue for the District of Wyoming her federal income tax return for the calendar year 1926; that said return showed a tax of $3,122.76, which was paid in full before December 15, 1927; and that on November 1, 1928, the plaintiff made and filed an alleged amended income tax return for the calendar year 1926, which showed a tax of $1,413.85. All other allegations in said paragraph, the defendant denies.

2. Defendant admits the allegations in paragraph
18 2 of the third cause of action set forth in the petition that in said alleged amended return the plaintiff included, with other items, the sum of $11,573.89 as income from fiduciaries. All other allegations in said paragraph, the defendant denies.

3. Defendant is without knowledge as to the facts alleged in paragraph 3 of the third cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts alleged in paragraph 4 of the third cause of action set forth in the petition and demands strict proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the third cause of action set forth in the petition.

6. Defendant denies the allegations in paragraph 6 of the third cause of action set forth in the petition.

7. Defendant denies the allegations in paragraph 7 of the third cause of action set forth in the petition.

8. Defendant admits the allegations in paragraph 8 of the third cause of action set forth in the petition.

Wherefore, defendant demands judgment that the petition be dismissed and for costs herein.

ALBERT D. WALTON,
United States Attorney,
Attorney for Defendant.

United States of America, District of Wyoming—ss.

Albert D. Walton, being of lawful age, and being first duly sworn according to law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is attorney for the defendant in the above-entitled cause; that he
19 has read the above and foregoing answer and knows the contents thereof, and that all of the facts therein stated and allegations therein contained are true, as he verily believes.

ALBERT D. WALTON.

Subscribed in my presence and sworn to before me this 30th day of March, A. D. 1931. Capitola G. Allison, Deputy Clerk, U. S. District Court for the District of Wyoming.

Stipulation of Waiving of Trial by Jury.

Filed May 11, 1931.

It is hereby stipulated by and between the parties
20 to the above entitled cause and their respective attorneys that the said cause may be tried to the Court without the intervention of the jury, trial by jury being hereby expressly waived.

Dated this 11th day of May, 1931.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

Attorney for Defendant.

Richard F. Cooper, Plaintiff, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2062, Civil-Law.

Barbara V. Cooper, Plaintiff, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2063, Civil-Law.

Richard F. and Barbara V. Cooper, Plaintiffs, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue. No. 2064, Civil-Law.

Filed April 7, 1932.

Corthell, McCullough & Corthell, of Laramie, Wyo., for Plaintiffs.

Albert D. Walton, U. S. Attorney, of Cheyenne, Wyo., John R. Wheeler, Special Attorney, C. M. Charest, General Counsel, and Percia E. Miller, Special Attorney, all of the Bureau of Internal Revenue, of Washington, D. C., for Defendant.

Judge's Memorandum.

Decided April 7, 1932.

KENNEDY, District Judge.

These are cases in which the plaintiffs are seeking
21 to recover income taxes assessed by the Commissioner in the nature of deficiencies and paid under protest, appropriate demands having been subsequently made to refund the same and refused. After issues were joined, the causes were tried and submitted together upon a stipulation of facts, jury being waived. Trial briefs have been
22 filed.

The matter raises a rather controversial point of law which will undoubtedly invite a review by an appellate court, so that an extended rehearsal of the facts by this Court would seem unnecessary in the light of their being stipulated. Suffice it to say, that the question presented for determination is, as to whether or not the plaintiffs as beneficiaries under a trust created by the will of one Arthur Francis Thomas Cooper are entitled to an allowance for a depletion as applied to their proportionate shares of funds accruing from oil royalties collected by said trust and distributed to them as such beneficiaries. Such depletion was claimed by plaintiffs for various years, extending from the year 1923 to the year 1928, and under the stipulation as I view it, the amounts sought to be recovered by the plaintiffs are identical amounts paid as taxes by said plaintiffs under protest, representing the deductions for depletion, the computation of such depletion not being in dispute. Except as there

may be possible corrections to be made on account of tax computations, the same general principle underlies the determination of the question as a matter of law in each case and therefore this memorandum will not discuss details.

The various income tax statutes under which the Commissioner purported to assess the tax for the several years are substantially the same as applied to the point under consideration.

The will, so far as its pertinent portions are here concerned, provides as follows:

> "14. I give devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees Upon trust that my trustees shall sell call in collect and convert into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to
23 arise from such calling in or conversion pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon as to the first sixty thousand pounds thereof Upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof. Upon trust to pay one equal third share to each of my said children Richard Francis

Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) Upon the trusts declared concerning the first sixty thousand pounds."

"15. I hereby declare that my trustees shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same Upon trust to invest the same in any of the securities authorized by this my will with full power to sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death Upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages of times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment Upon trust for all or any the children or child or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females shall attain the age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

"16. I hereby declare that in the event of my daughter dying without leaving any issue her surviving my trustees shall hold the said trust premises upon trust

for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the direction of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares and so that the division shall be per stirpes and not per capita Provided that any share appointed to any child of mine or my said daughter or his or her issue under
24 the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the un-appointed part of the said trust premises.

"17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken had he or she survived me if more than one in equal shares per stirpes and not per capita.

"18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving

issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees Upon trust for the survivor of them absolutely."

As I view the situation here presented, the determining factor in the matter of the validity of the tax, is as to whether the plaintiffs as beneficiaries under said trust have or have not an interest in the corpus covered by the trust. If they have such an interest the depletion is properly deductible and the tax is improperly assessed; while on the contrary, if they have no interest in such corpus, the depletion charged is not deductible and the taxes are proper.

That the disagreement arises over oil royalties of which the testator was possessed and the proceeds from which have subsequently come into the trust, is not in dispute. The income tax figures were arrived at by the fiduciary deducting from the royalties the properly computed depletion which in turn was claimed in proportionate amounts by the beneficiaries in the computation of their income.

The provisions of the will concerning the trust features, construed as free from legal technicality, amount to the mere passing of the income accruing from the royalties through the trust to the beneficiaries and therefore in substance, the situation is the same as though the beneficiaries were receiving such royalties direct, in which latter situation there could be no doubt that the beneficiaries would be entitled to a deduction by way of appropriate depletion in connection with this class of property. To hold otherwise would mean in substance that such beneficiaries were paying a tax on property, which is not within the contemplation nor is it permissible under the provisions of the Sixteenth Amendment and the statutes enacted thereunder.

Further elaboration of the views of this Court concerning the rule of law to be applied to the trust under consideration would serve no useful purpose. I am unable to distinguish on principle this case from the case of Merle-Smith v. Commissioner, 42 Fed. (2d) 837, in which case certiorari was denied by the Supreme Court. 282 U. S. 897. Depletion was there allowed the beneficiaries.

It should be remembered that tax statutes in case of doubt are most strongly construed against the Government. Gould v. Gould, 245 U. S. 151; United States v. Merriam, 263 U. S. 179; Burnet v. Niagara Falls B. Co., 282 U. S. 648, and that in applying the provisions of the income tax laws matters of form should be disregarded for those of substance. United States v. Phellis, 257 U. S. 156.

Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinbefore stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases.

Barbara V. Cooper, Plaintiff, vs. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2063 Civil.

Judgment.

Filed May 13, 1932.

26 This cause having heretofore come on to be heard before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury and the plaintiff having appeared by N. E. Corthell, her attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Attorney for the District of Wyoming, his attorneys, and the Court having taken the case under advisement, and having considered the stipulation of facts and the other evidence and the admissions made in open court, and having heard the argument of counsel and being now fully advised:

The Court finds generally for the plaintiff, Barbara V. Cooper, and against the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the first cause of action for the sum of Two Hundred Eighty-

three and 13/100 Dollars ($283.13) with interest at the rate of 6% per annum from June 19, 1929; upon the second cause of action for the sum of Five Hundred Eighty-five and 91/100 Dollars ($585.91) with interest at the rate of 6% per annum from December 15, 1926; and upon the third cause of action for the sum of One Thousand Seven Hundred Eight and 91/100 Dollars ($1,708.91) with interest at the
27 rate of 6% per annum from December 15, 1927.

It is therefore considered and adjudged by the Court that the plaintiff, Barbara V. Cooper, do have and recover from the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the first cause of action the said sum of Two Hundred Eighty-three and 13/100 Dollars ($283.13) with interest at the rate of 6% per annum from June 19, 1929; upon the second cause of action for the said sum of Five Hundred Eighty-five and 91/100 Dollars ($585.91) with interest at the rate of 6% per annum from December 15, 1926; and upon the third cause of action for the sum of One Thousand Seven Hundred Eight and 91/100 Dollars ($1,708.91) with interest at the rate of 6% per annum from December 15, 1927; together with the costs of this action to be taxed.

To which finding and judgment and every part thereof the defendant excepted at the time; and the defendant is hereby given sixty days within which to prepare and file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collection of the income taxes for the recovery of which this action was brought.

Done in open Court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Petition for Appeal.

Filed Aug. 8, 1932.

The above-named defendant, Marshall S. Reynolds,
28 Individually and as Collector of Internal Revenue, petitioner herein, feeling himself aggrieved by the

order and judgment entered in the above-entitled cause on the 13th day of May, A. D. 1932, in favor of the plaintiff in the above-entitled action and against the defendant herein, wherein and whereby it was ordered and adjudged that plaintiff have judgment against the defendant, does hereby appeal from said order and judgment entered on the 13th day of May, A. D. 1932, and from the whole thereof, to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons and upon the grounds specified in his assignment of errors filed herein, and defendant prays that this, his petition for appeal, and his said appeal may be granted and allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said order and judgment was made and entered, duly authenticated, may be sent to the United States Court of Appeals for the Tenth Circuit.

Dated this 8th day of August, A. D. 1932.

MARSHALL S. REYNOLDS,
Individually and as Collector of
Internal Revenue, Defendant,

By ALBERT D. WALTON,
United States Attorney for the
District of Wyoming.

29 EWING T. KERR,
Assistant United States Attorney
for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Assignment of Errors.

Filed Aug. 8, 1932.

30 Marshall S. Reynolds, Individually and as Collector of Internal Revenue, defendant in the above-entitled cause, by Albert D. Walton, United States Attorney for the District of Wyoming, Ewing T. Kerr, Assistant United States Attorney for the District of Wyoming, and

John R. Wheeler, Special Attorney for the Bureau of Internal Revenue, his attorneys, having filed petition for appeal, as provided by law, that defendant appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final order and judgment made and entered in said cause on May 13, 1932, in favor of the plaintiff and against the defendant herein, now makes and files in support of said appeal the following assignment of errors upon which it will rely for reversal of said final order and judgment upon the said appeal, which said errors, and each and every one of them, are to the great detriment, injury and prejudice of this defendant, and defendant says that in the records and the proceedings on the hearing and determination of this cause in the District Court of the United States for the District of Wyoming there are manifest errors in this, to-wit:

I.

That the Court erred in holding that the sum of $1,520.99 claimed by plaintiff as deduction for depletion was not income to plaintiff for the year 1923.

II.

That the Court erred in holding that the difference between the actual gross receipts as returned by the
31 plaintiff in the income return for the year 1923 and the gross receipts as determined by the Commissioner by apportionment in the sum of $1,049.62 was not income to the plaintiff for the year 1923.

III.

That the Court erred in holding that the income to the plaintiff for the year 1923 was not the sum of $14,688.03, but was in a lesser amount.

IV.

That the Court erred in holding that the sum of $4,344.93 claimed by plaintiff as deduction for depletion was not income to plaintiff for the year 1925.

V.

That the Court erred in holding that the sum of $4,787.87 claimed by plaintiff as deduction for depletion was not income to the plaintiff for the year 1926.

VI.

That the Court erred in holding that the net income to the plaintiff for the year 1925 was not the sum of $24,587.97, but was in a much lesser amount.

VII.

That the Court erred in holding that the net income to the plaintiff for the year 1926 was not the sum of $29,178.49, but was in a much lesser amount.

VIII.

That the Court erred in overruling defendant's motion for judgment in favor of the defendant.

IX.

That the Court erred in granting and allowing plaintiff's motion for judgment in favor of the plaintiff and against the defendant.

X.

That the Court erred in making and entering judgment in favor of the plaintiff and against the defendant.

Therefore, defendant prays that the said order and
32 judgment entered herein, as aforesaid, in favor of the plaintiff and against the defendant, be set aside, annulled, reversed and held for naught, and that said cause be remanded to the District Court for further proceedings in the premises, and for such other and further relief to which the defendant may be entitled.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Order Allowing Appeal.

Filed Aug. 8, 1932.

33 The above-entitled cause coming on regularly to be heard upon the petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the above-named defendant praying that an appeal be allowed herein from the order and judgment made and entered herein on May 13, A. D. 1932, and for the reversal of said order and judgment, and said petitioner having filed herein and presented to this Court his said petition for appeal and an assignment of errors relied on and intended to be urged by him upon said appeal, and it appearing to the Court that petitioner is entitled to said appeal:

Now, therefore, on motion of Ewing T. Kerr, Esquire, Assistant United States Attorney for the District of Wyoming, of counsel for the petitioner, it is ordered that the said petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, defendant above named, for appeal from said order and judgment made and entered on May 13, A. D. 1932, be, and the same hereby is, granted, and the said appeal be, and the same hereby is, allowed without the filing of an appeal bond or on behalf of said defendant.

Dated this 8th day of August, A. D. 1932.

T. BLAKE KENNEDY, Judge.

[Citation in proper form, directed to appellee, with acceptance of service by counsel for said appellee, was filed in the District Court on Aug. 11, 1932.]

BILL OF EXCEPTIONS.

Filed Sept. 2, 1932.

36 Be it remembered that on the 7th day of January, A. D. 1932, at ten o'clock A. M. of said day, the above entitled cause came on for trial before the Court without the intervention of a jury, a trial by jury having been waived in writing, the Honorable N. E. Corthell appearing as attorney for plaintiff, and Albert D. Walton, United States Attorney for the District of Wyoming, and the Honorable

John R. Wheeler, Special Attorney, Bureau of Internal Revenue, appearing on behalf of defendant.

After opening statements by counsel the following proceedings were had:

A stipulation of facts having been filed in this cause was offered and received in evidence and is as follows:

Stipulation of Facts.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. The plaintiff on or about the several dated hereinafter mentioned filed with the defendant as Collector of Internal Revenue, original and amended returns of taxable income for the several years hereinafter mentioned:

37

	Original Return	Amended Return
For 1923	March 15, 1924	October 30, 1928
For 1925	Aug. 26, 1926	October 30, 1928
For 1926	June 15, 1927	October 30, 1928

The income taxes shown on said original returns respectively were paid by the plaintiff to the defendant as follows, to-wit:

For 1923	March 19, 1924	$200.00	
	June 10, 1924	100.00	
	Sept. 15, 1924	184.43	
	Sept. 15, 1924	38.94	
	Total		$523.37
For 1925	March 12, 1926	$300.00	
	June 14, 1926	300.00	
	Aug. 26, 1926	200.00	
	Sept. 15, 1926	400.00	
	Dec. 14, 1926	325.18	
	Total		$1,525.18

For 1926	March 14, 1927	$1,000.00
	June 15, 1927	600.00
	Aug. 22, 1927	1,512.76
	Dec. 15, 1927	10.00
	Total	$3,122.76

2. In the said amended return filed by the plaintiff for the period September 13, 1923, to December 31, 1923, inclusive, and for the entire year 1925 and for the entire year 1926, the said plaintiff included as representing one-half of the distributive share of John Hartshorn Cooper, deceased, the following sums, respectively;

For the period Sept. 13, to Dec. 31, 1923	$ 455.00
For 1925	7,670.86
For 1926	11,573.87

3. The right and title of the plaintiff by which her one-half interest in the distributive share of said John Hartshorn Cooper, deceased, accrued to the plaintiff, was derived under the will and codicil thereto of said A. F. T. Cooper, a copy of which is hereto attached and marked Exhibit A and by reference is hereby made a part hereof as though fully
38 set out at this point.

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. A copy of said lease is attached hereto and marked Exhibit B and by reference is hereby made a part hereof. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during 1923 and subsequent years the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1923 and subsequent years, consisting of royalties under the said lease and interest on funds in their hands, in the manner following, to-wit: The receipts accruing prior to September 13, 1923, in the proportions of one-fourth to the plaintiff or to her use, one-fourth to the administrator of the Estate of said John Hartshorn Cooper (deceased in 1921) and one-half

to Richard F. Cooper; and the receipts accruing on and after September 13, 1923, in the proportions of one-fourth to the plaintiff or to her use, one-eighth to the plaintiff as a devisee under the will of said John Hartshorn Cooper and the remaining five-eighths to said Richard F. Cooper.

5. For each of the years 1923 to 1926, inclusive, said trustees made and filed with the defendant as Collector of Internal Revenue a fiduciary information return. The gross income shown on said returns consisting of interest on funds in the hands of trustees and gross receipts from oil and gas royalties under said lease and the deductions claimed by the trustees therefrom for taxes and expenses paid and for depletion and the resulting net income as returned by the trustees for each of said tax years were respectively as follows:

	Gross Income	Deduction Claimed for Taxes and Expenses	Deduction Claimed for Depletion	Net Income
1923	$ 88,148.47	$ 7,891.55	$43,608.67	$36,648.25
1925	102,440.95	6,314.62	34,759.43	61,366.90
1926	135,487.79	4,600.81	38,296.04	92,590.94

In 1928 the Commissioner of Internal Revenue con-
39 sidered the original returns of the trustees and of the plaintiff and the other beneficiaries under the trust estate and held that the deductions claimed for depletion of the oil and gas deposits were not allowable.

6. If the contention of the plaintiff that depletion is lawfully allowable to the plaintiff is determined by the Court in her favor, then the deductions to be allowed from gross income of the plaintiff on account of depletion for the years 1923, 1925 and 1926, are the amounts which have been claimed by the plaintiff in the Federal income tax returns filed for those years and which are as follows:

1923	$1,520.99
1925	4,344.93
1926	4,787.87

It is, however, agreed that the defendant objects to the materiality, competency or relevancy of the above amounts of depletion inasmuch as the defendant contends that under the

provisions of the will of A. F. T. Cooper, as properly construed, the plaintiff has no present property interest in the corpus which would warrant the right to a depletion deduction, or serve as a basis for a depletion deduction.

7. On December 22, 1928, the Commissioner determined and assessed the income tax of the plaintiff for the year 1923 and on February 25, 1929, he determined the income taxes of the plaintiff for the years 1925 and 1926, respectively. In such determinations the plaintiff's net income was fixed for the several years as follows:

1923	1925	1926
$14,688.03	$24,587.97	$29,178.49

40 In the plaintiff's amended returns for said years her net income was shown as follows:

1923	1925	1926
$12,119.65	$20,243.04	$24,391.49

In said determination as above set out the Commissioner included as income derived by the plaintiff from her one-half interest in the one-fourth interest of said John Hartshorn Cooper, the following sums respectively:

1923	1925	1926
$ 3,023.38	$12,015.79	$16,360.87

In her amended returns for said years the plaintiff included as income from the same source for each of said years the following sums:

1923	1925	1926
$ 455.00	$ 7,670.86	$11,573.87

The Commissioner in his determination and assessment for 1923 determined the net income derived by the plaintiff from her one-half interest in the one-fourth interest of said John Hartshorn Cooper by apportioning the gross receipts and deductions between the period January 1—September 12, and the period September 13—December 31, 1923, according to the number of days included in each of said periods. Except as aforesaid, such determinations and assessments were respectively based wholly on the disallowance by the Commissioner of the deductions claimed in the fiduciary returns of the trustees for depletion of the oil and gas deposits

from which the royalties aforesaid were derived and the addition of the following sums for each of said tax years, respectively to the net income shown by the plaintiff's respective returns:

1925	$4,344.93
1926	$4,787.00

For the year 1923 such determination and assessment was based upon the following elements of the plaintiff's income representing her one-half of the distributive share of said John Hartshorn Cooper, deceased, viz:

Gross income returned by the plaintiff	$ 455.00
Depletion claimed by the plaintiff and disallowed by the Commissioner	1,520.99
Difference between the actual gross receipts as returned by the plaintiff and the gross receipts as determined by the Commissioner by apportionment as set forth in Paragraph 7 hereof	1,049.62
Total	$3,023.28

8. On December 22, 1928, the Commissioner of
41 Internal Revenue determined and assessed against the plaintiff an additional income tax for 1923, in the sum of $303.55, in the manner set forth in paragraph 7 hereof, which tax with interest amounting to $96.08, making an aggregate of $399.63, was paid by the plaintiff to the defendant on June 19, 1929, under protest.

9. On March 14, 1929, the defendant demanded payment by the plaintiff of the additional tax assessed for 1923, together with interest thereon amounting in the aggregate to $399.63, whereupon under compulsion and protest the plaintiff on June 20, 1929, paid to the defendant the said sum of $399.63.

10. On September 15, 1929, the plaintiff made and filed with the defendant and the Commissioner of Internal Revenue applications to refund the sum of $283.13, with interest thereon for the year 1923; the sum of $589.03, together with interest thereon for the year 1925; and the sum of $1,708.91, together with interest thereon for the year 1926, and demanded payment thereof and thereafter, to-wit: on the 31st

day of October, 1930, said applications and demands were respectively refused.

11. The plaintiff's net income for the years 1923, 1925 and 1926, respectively, as shown on her original return and on her amended return and as determined and assessed by the Commissioner was as follows:

Net Income.

	Original Return	Amended Return	Net Income as Adjusted by Commissioner
1923	$10,978.38	$12,119.65	$14,688.03
1925	25,584.77	20,243.04	24,587.97
1926	37,539.22	24,391.49	29,178.49

The taxes computed on said returns and assessments
42 respectively were as follows:

Computation of Taxes.

	Original Return	Amended Return	Total Tax Liability as determined by the Commissioner
1923	$ 523.37	$ 609.87	$ 826.92
1925	1,525.18	936.15	1,402.43
1926	3,122.76	1,413.85	1,965.07

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney,

JNO. R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Exhibit A.

This is the last Will and Testament of me Arthur
43 Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby, England.

1. I hereby revoke all former wills and testamentary dis-

positions made by me and declare this to be my last will and testament.

2. I appoint my son Richard Francis Cooper and my brother in law the Reverend Christopher Barber Collinson and Edgar Percy Lewis of No. 32 Queen Victoria Street in the city of London Solicitor to be the executors and trustees of this my will and they and the survivor of them and the executors and administrators of such survivor his and their assigns or other the trustees or trustee for the time being of this my will are hereinafter referred to as "my trustees":

3. I give to the said Reverend Christopher Barber Collinson a legacy of five hundred pounds free of legacy duty and to the said Edgar Percy Lewis a legacy of two hundred pounds free of legacy duty if they shall prove this my will and any codicil or codicils I may make thereto and act in the trusts thereof.

4. I bequeath the use and enjoyment of all articles of personal or domestic or household or stable or garden use or ornament belonging to me to my wife Jane Mary Evelyn Cooper during her life she keeping the same properly insured against loss or damage by fire and after her death but subject to the exercise of the power of gift hereinafter given to my said wife I bequeath the same to my said son Richard Francis Cooper. And I declare that it shall not be necessary for my trustees to take any inventory of the articles bequeathed by this clause and that my trustees shall not be concerned to see to the insurance thereof or be liable for any loss or damage that may happen thereto from any cause whatever. And I expressly declare that my said wife shall have full liberty during her lifetime to give any or all of my big game or other trophies to my son Richard Francis Cooper and to him and either of my other children any of the articles (other than the said big game and other trophies) bequeathed to her for life by this clause.

5. I give devise and bequeath subject to my wife's' life interest therein the ten thousand pounds or other the investments for the time being representing the husband's fund of the settlement made on my marriage with my present wife in one thousand eight hundred and ninety-nine equally to

and amongst my three children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts hereinafter declared in clause 15 hereof.

6. I give to my daughter Barbara Violet Cooper the sum of five thousand pounds free of legacy duty to be paid in priority to all legacies bequeathed by this my will and to be held by my trustees upon the trusts hereinafter declared concerning the same in clause 15 hereof.

7. I give to my old and faithful servant Philip Austin a legacy of one hundred pounds free of legacy duty.

8. I bequeath to the said Philip Austin, an annuity of one pound a week and to my old servant Jessie Oliver an annuity of ten shillings a week. Both annuities are to be free from death duties and are to commence from the day of my death and to be payable weekly and the first payments thereof are to be made as soon as my trustees can conveniently make the same immediately after my death.

9. Provided always and I declare that if any act or event shall happen in my lifetime or after my death whereby the said annuities or either of them would if belonging absolutely to the said Philip Austin or the said Jessie
44 Oliver respectively become vested in or charged in favour of some other person or persons or a corporation then such annuity shall cease as if he or she were dead. Provided always and I declare that my trustees shall not be liable or responsible for paying the annuities hereinbefore bequeathed to the said Philip Austin and Jessie Oliver or either of them after the determination during his or her lifetime of the trust hereinbefore declared in his or her favour unless or until my trustees shall have received express notice of the event causing such failure or determination.

10. I authorize my trustees in case at any time with a view to the due administration or distribution of my estate it shall be deemed convenient so to do to appropriate and retain a sufficient part of my estate or the investments representing the same for answering by the annual income thereof any annuity hereinbefore bequeathed but without prejudice to the powers of sale and investment and transposing investments hereinafter contained and I declare that if the annual

income of the appropriated fund shall at the time of appropriation be sufficient to satisfy such annuity such appropriation shall be a complete satisfaction of the trust to provide for such annuity and that if the income of the appropriated fund shall at any time and from any cause whatever prove insufficient for payment of such annuity in full resort may be had to the capital thereof from time to time to make up such deficiency and the surplus income (if any) of the said fund from time to time after the payment of the said annuity shall be applicable as income of my residuary estate. And I declare that as and when such annuity shall cease the appropriated fund shall sink into my residuary estate.

11. I give to my trustees the sum of ten thousand pounds free of legacy duty upon trust to invest the same in any of the stocks shares and securities authorized by this my will and with power from time to time to vary such investments as they may see fit and to pay the income arising from such investments to my said wife Jane Mary Evelyn Cooper during her life for her own separate use and without power of anticipation and from and after her death upon trust as well income as capital for my two sons Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

12. Whereas I have in the events that have happened a power of appointment over the funds subject to an indenture of settlement dated the eighteenth day of June one thousand eight hundred and eighty-eight made on my marriage with my late wife Dorothy Jane Collinson now therefore I hereby appoint that the trustees for the time being of the said settlement shall stand possessed of the investments for the time being representing the fund subject to the trusts of such settlement upon trust as to one equal third share for my son Richard Francis Cooper and as to another equal third share for my son John Hartshorn Cooper and as to the remaining equal third share for my daughter Barbara Violet Cooper absolutely. Provided always and I hereby declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue then I appoint that the one-third share of the one so predeceasing me shall be held upon trust for the other of them and in the event of their both predeceasing me without leaving issue I appoint that their one-third shares shall be held upon trust

for the said Barbara Violet Cooper absolutely. And I also declare and appoint that in the event of the said Barbara Violet Cooper predeceasing me without leaving issue that her one-third share shall be held upon trust for the said Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

13. I devise and bequeath all my freehold land messuages and premises known as the Culland Hall estate in the county of Derby unto and to the use of my trustees upon trust for my wife Jane Mary Evelyn Cooper for life and from and after her death upon trust for my said son Richard Francis Cooper his heirs and assigns forever.

14. I give devise and bequeath all the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell call in collect and convert into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to arise from such calling in or conversion pay my funeral and testamentary expense and debts and the legacies and annuities bequeathed by this my will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon as to the first sixty thousand pounds thereof upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof upon trust to pay one equal third share to each of my said children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet

Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) upon the trusts declared concerning the first sixty thousand pounds.

15. I hereby declare that my trustee shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same upon trust to invest the same in any of the securities authorised by this my will with full power to sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in the lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any the children or child or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females shall attain that age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

16. I hereby declare that in the event of my daughter dying without leaving any issue her surviving my trustees shall hold the said trust premises upon trust for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions

for their respective advancement and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares and so that the division shall be per stirpes and not
46 per capita. Provided that any share appointed to any child of mine or my said daughter or his or her issue under the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the unappointed part of the said trust premises.

17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken had he or she survived me if more than one in equal shares per stirpes and not per capita.

18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for the survivor of them absolutely.

19. I declare that all estate duty on my Culland Hall estate and death duties on my foreign and colonial property

(if any) and all legacy duty payable in respect of any devise legacy or annuity under this my will consequent on my death but not on the death of any life tenant or annuitant shall be paid out of my residuary estate.

20. I hereby declare that the said Edgar Percy Lewis or any trustee being a solicitor or any other person engaged in any profession or business may be employed to act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts hereof including acts which a trustee could have done personally.

21. My trustees shall invest in their names all monies which for the time being may be subject to the trusts of this my will and requiring investment in or upon (a) The public stocks or funds or government securities of the United Kingdom or of India or of any British colony or dependency or state or of any foreign government or state (b) Freehold copyhold or chattel real securities in England Scotland or Wales (c) The bonds debentures debenture stock mortgage obligations or securities or the guaranteed or preference or ordinary or preferred ordinary or deferred ordinary stock or shares of any company incorporated or registered in or under the legislature of the United Kingdom or of India or of any British colony or dependency or state or of any foreign country or state on which there is no liability and provided that interest or dividends shall for the three years immediately preceding the date of investment have been regularly paid by any such company on its ordinary stock or shares (d) The securities of any public or municipal or local body or authority in the United Kingdom or in any British colony or dependency or state or in any foreign country or state.

22. I hereby appoint my trustees for all the purposes of the Settled Land Acts 1882-1890 and section 42 of the Conveyancing Act 1881.

23. I hereby declare that all gifts legacies devises
47 and share of residue given to my said sons and daughter are in addition to any gifts made to them during my lifetime unless I have in making any such gift declared in writing to the contrary. In Witness Whereof I have to

this and the five preceding sheets of paper hereunto set my hand this eighteenth day of June one thousand nine hundred and eighteen.

ARTHUR FRANCIS THOMAS COOPER.

Signed by the said Arthur Francis Thomas Cooper the testator as and for his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—J. F. Talley—C. J. Walsh—) Clerks to Messrs g f hudson matthews & co 32 queen victoria street London e c 4 Solrs.

This is a first codicil to the last will and testament dated the eighteenth day of June one thousand nine hundred eighteen of me Arthur Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby Esquire.

1. I hereby declare that my trustees shall have full power of postponing for any length of time as in their uncontrolled discretion they may think fit the realization of the oil rights under my ranch in Wyoming U. S. A., without being liable for any loss arising therefrom and of deciding what proportion of the annual receipts therefrom shall be treated as capital and what proportion as income and their decision shall be considered for all purposes as final.

2. I hereby revoke that part of clause 14 of my said will which succeeds the words "and shall hold the residue of such moneys after payment of legacy duty thereon" and in lieu and stead thereof I declare that clause 14 shall read from and after such words as follows, viz:

"Upon trust (as to the first twenty-one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper the sum of seven thousand pounds to my son John Hartshorn Cooper and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate and as to the residue (if any) thereof upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely and as to one fourth part or share for my said son John Hartshorn Cooper absolutely and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper but so that such last mentioned one-fourth part or share

shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

3. I declare that if my residuary estate without the value of my said oil rights is not equal to twenty-one thousand pounds my trustees shall until the realization of my oil rights or sufficient of them to produce with the rest of my residuary estate the said sum of twenty-one thousand pounds mentioned in clause 2 hereof or the expiration of twenty-one years after my death whichever shall be the shorter period pay out of the annual income from my residuary estate to each of my said sons during his life the sum of three hundred and fifty pounds less income tax or if such income is insufficient to pay such sums divide the same equally between my said sons and accumulate the balance in any year in which the income shall be more than sufficient for the payment of the said sum of three hundred and fifty pounds and such accumulations shall be considered as capital monies and held upon the trusts declared concerning my residuary estate.

4. I declare that if after the payment of the said sum of twenty-one thousand pounds all my oil rights have not been realized my trustees shall value my daughters one-fourth share of such oil rights and shall pay to her out of the monies received each year from such oil rights a sum equal to ten per cent free of income tax on such value and accumulate the balance (if any) and such accumulations shall be considered as capital monies and held upon the trusts declared concerning her said trust legacy of five thousand pounds.

48

5. In all other respects I confirm my said will.

In Witness whereof I have hereunto subscribed my name this twelfth day of November one thousand nine hundred and eighteen—Arthur Francis Thomas Cooper—Signed by the said Arthur Francis Thomas Cooper as and for a first codicil to his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—F. B. Hulke—Admiralty House Deal Surgeon—M A Tucker Evans 22 Langham Street London Nursing Sister.

Exhibit B.

Copy

This Memorandum of Agreement made the ninth
49 day of October, 1917, between Frank Cooper and Frank O. Harrison, as Trustee for the use of said Frank Cooper, parties of the first part, and The Ohio Oil Company, a corporation, formed under the laws of Ohio, of Casper, Wyoming, party of the second part, Witnesseth:

1. The first parties have granted to the second party the exclusive privilege to prospect and explore for oil and gas and to develop and produce oil and gas on the following described lands of the parties of the first part, to-wit:

All of Sections One (1), Two (2), Three (3), Eleven (11), Thirteen (13), Fifteen (15), Twenty-three (23), and the West Half of the West Half (W½W½) of Section Twelve (12), and the West Half of the Northwest Quarter (W½NW¼), the Southeast Quarter of the Northwest Quarter (SE¼NW¼), and the Northwest Quarter of the Southwest Quarter (NW¼SW¼) of Section Fourteen (14), all in Township Nineteen (19) North of Range Seventy-eight (78) West, and the North Half (N½), the West Half of the Southeast Quarter (W½SE¼), and the Southwest Quarter (SW¼) of Section Twenty-seven (27), and the South Half (S½) of Section Thirty-five (35), all in Township Twenty (20) North of Range Seventy-eight (78) West of the Sixth Principal Meridian, all situated in Carbon County, Wyoming.

The second party may employ all lawful and usual means to discover, develop and produce oil and gas upon said lands, and shall forthwith enter upon such undertaking and prospect, drill, explore for, develop and produce the same with all usual and reasonable diligence continuously during the continuance of this agreement.

It is understood between the parties that the parties of the first part herein have heretofore conveyed away all their right, title and interest in said lands "excepting and reserving however unto the said Frank Cooper, and unto the said Frank O. Harrison, as Trustee, for the use of said Cooper, and to their heirs, successors and assigns all oil and all gas underlying the said lands or any of them with the perpetual right to explore for, develop, extract and take away the same".

It is especially agreed that the second party shall in all things keep within the rights so excepted and reserved, and shall not interfere with the rights of the prior grantees of said Cooper and Harrison.

2. This agreement, unless sooner terminated for cause, shall continue for the period of twenty (20) years from the date hereof. In the event that oil or gas in paying quantities is being produced at the expiration of the 20-year period aforesaid, the second party shall be entitled to an extension of said period for a further term of twenty years, upon like conditions, but the royalty payments during such extended period shall be at the rate of twenty per cent (20%).

3. The second party will pay to the first parties the sum of one hundred dollars ($100.00) as a minimum rental for each full section of said lands or the equivalent of a full section for each year during the continuance of this agreement. Each of said payments shall be applied on the percentage, if any, to be paid within the year to the first parties as herein provided.

4. In the event that the production of oil and gas in any year shall not be sufficient to compensate the minimum payment for such year, then such payment shall be taken to be rental for the said premises for such time as the same shall have been occupied within such year.

5. At all times during the continuance of the privilege hereby granted the second party shall prosecute the work of discovery, development and production of oil and gas with diligence suitable to the undertaking and adequate to realize the full benefit of the natural resources of said lands, practicing the best and most approved appliances employed in the same or similar fields for such purposes, and using due care to see that the oil and gas within said lands shall be produced from wells within the limits thereof and not drained away through wells on neighboring lands. It is the intent of this agreement that the second party shall develop and produce oil and gas from all the various oil or gas bearing strata in said lands of whatsoever depth within practicable limits. No waste shall be permitted. Loss by fire, explosion or other casualty shall be carefully guarded against. Adequate facilities for storage

and transportation shall be provided. If devices for the conversion of gas into oil shall be employed or shall be practicable in the same or similar fields, such appliance shall be put in use on said premises, all by the second party. The second party shall drill at least one well at a convenient and promising location to be selected by it near the dividing line between said Sections 2 and 35, to a sufficient depth to reach the supposed oil bearing sands in that region corresponding to the so-called Frontier sand in the Lost Soldier field or the Wall Creek sand in the Salt Creek field in Wyoming, not exceeding, however, a depth of three thousand feet (3,000). The drilling of such well shall be commenced within sixty (60) days after acceptance by the first parties of this agreement, and drilling shall be prosecuted with all reasonable diligence continuously thereafter and the drilling of such well shall be completed within six months from the time of commencement. During the second six months not less than one additional well shall be drilled by the second party as above specified; during each subsequent six months not less than two additional wells. On default in these requirements the first party may terminate this agreement, offsetting wells shall be drilled by second party against each foreign well within three hundred (300) feet of the boundary line.

6. The second party shall keep full and accurate logs of all drillings; full and complete accounts and records of all discoveries, production and disposition of oil and gas, and accurate accounts of all expenditures in the aforesaid undertakings. At all times free access shall be given to the first parties or their representatives to the premises and to the logs, accounts and records in any way relating to the same. As soon as practicable after the close of each month the second party will make full and accurate reports to the first parties as may be required touching all matters in any way connected with this agreement; and like special reports shall be made whenever requested. All such reports shall be verified by some responsible agent of the second party having actual knowledge of the facts.

7. The second party shall deliver to the first parties as produced during the first year twelve and a half per cent (12½%); during the second year thirteen per cent (13%); during the third year thirteen and a half per cent (13½%)

and so on, increasing each year one-half of one per cent of all oil or gas produced from the said premises, for first ten years, after which the royalty interest shall be twenty per cent (20%) during the remainder of this lease or any extension thereof, the same being delivered free of cost in storage tank or pipe line connected with the wells on said premises; or at the option of the first parties such deliveries may at any time or from time to time be commuted into cash at the market price for crude oil at the wells then prevailing in the field where the premises are situated.

8. The privilege hereby granted to the second party shall not include the exclusive right of possession or use of the surface or other portions of said lands, but only such as are necessary for the prosecution of the undertakings aforesaid. The second party shall at all times so conduct his operations as to interfere as little as practicable with the full use and enjoyment of the surface of said lands and other portions thereof not required for the purposes of this agree-
51 ment. Whenever requested by the first parties, the second party shall bury all oil, gas and water lines. At the termination of this agreement the second party will remove all refuse and obstructions of every kind from said premises, and restore said premises as nearly as practicable to their original conditions. No casings, however, shall be removed from any producing well, nor from any wells of water suitable for use which may be developed upon said premises, except such second or outer casing as may be removed without impairing the efficiency of the well.

9. No cessation of operations nor any delays in operation by the second party shall be excused unless the same shall be immediately reported to the first parties. All such notices shall be given to the agent of the first parties, and in each case of cessation or delays shall be accompanied with a full and particular statement of the causes and circumstances deemed to justify or excuse the same.

10. No assignment of this agreement, or any part thereof, nor any grant or transfer of rights arising under the same, may be made by the second party unless in writing, and with the written consent and approval of the first parties.

11. This agreement is made subject to all existing ease-

ments or rights of way in said lands, and subject to the laws of Wyoming authorizing future grants of easement or rights of way. The second party shall observe the laws of Wyoming and conform to the same in all his operations under this agreement.

12. In the event that the second party shall make default in the performance of the conditions of this agreement on his part, the first parties may at their option terminate the same forthwith. All notices which may be required to be given under this agreement to the second party may be effectually given by mail to the address set forth at the beginning of this agreement.

13. All controversies which may arise between the parties concerning the meaning or effect of this agreement, or the rights of the parties under the same, shall, at the request of either party, be submitted to arbitration, such party appointing an arbitrator and these two if necessary, an umpire. The award of the board of arbitrators shall be final and binding upon the parties. Either party will, on ten days' notice, appoint an arbitrator, and the arbitrators shall meet within ten days after appointment and complete the organization of the Board of Arbitration, and make their award in writing within thirty days after appointment. This provision shall not deprive the first parties of the remedy of injunction.

14. The parties of the first part will appoint an agent resident of Wyoming to whom the notices and communications required by this agreement to be made by the second party shall be given.

In Witness Whereof the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused these presents to be executed by its President and Secretary, the day and year first above written.

That the foregoing stipulation of facts was all of
52 the evidence given or offered on the trial of said cause.

Whereupon the plaintiff moved for judgment in favor of

the plaintiff on the pleadings and proofs, which said motion was and is in words and figures as follows, to-wit:

Motion of Plaintiff for Judgment on Pleadings and Proofs.

The plaintiff upon the submission of the above entitled cause to the Court moves the Court upon the pleadings and the evidence for judgment in favor of the plaintiff and against the defendant for the amounts claimed in the petition with interest and costs.

Dated January 7, 1932.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

Whereupon defendant moved for judgment in favor of defendant, which said motion was and is in words and figures as follows, to-wit:

Motion for Judgment in Favor of Defendant.

Comes now Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the defendant above named, at the conclusion of all of the evidence introduced upon behalf of plaintiff and defendant, and moves the Court for judgment in favor of the said defendant and against the plaintiff, dismissing plaintiff's petition with costs to said defendant.

Dated this 7th day of January, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

The Court then made and entered an order taking
53 said case under advisement and allowing plaintiff ten days for filing brief and allowing defendant ten days thereafter for filing defendant's brief and allowing plaintiff

five days thereafter for filing plaintiff's reply brief, which said order was and is in words and figures as follows, to-wit:

Trial to Court and Case Taken Under Advisement.

At this day comes the plaintiff by N. E. Corthell, Esquire, her attorney, and the defendant, by John R. Wheeler, Esquire, Special Attorney for the United States Bureau of Internal Revenue, and Albert D. Walton, Esquire, United States Attorney for the District of Wyoming, also comes. And this case comes on now to be tried to the Court without a jury, pursuant to a written stipulation thereto heretofore filed herein.

Thereupon it is announced by counsel in open court that all evidence in this case will be in the form of written stipulation of facts herein filed.

Thereupon counsel for plaintiff announces he desires to file motion for judgment for plaintiff and permission therefor is granted by the Court, and thereupon plaintiff files motion for judgment herein. Also, counsel for defendant state that they desire to file motion for judgment for defendant and, permission being granted by the Court, the defendant thereupon files motion for judgment herein.

This case is thereupon argued to the Court by the attorneys for the parties hereto and is by the Court taken under advisement.

It is ordered by the Court that plaintiff be, and she is hereby, allowed ten days from and after this date within which to file and serve her brief; defendant is allowed ten days thereafter within which to file and serve his brief; and plaintiff is allowed five days thereafter within which to file and serve reply brief.

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54 Be it further remembered that on the 7th day of April, A. D. 1932, the Court handed down a Judge's Memorandum holding and deciding as follows, to-wit: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be sub-

mitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases."

Be it further remembered that on the 7th day of April, A. D., 1932, an order was duly entered granting counsel thirty days from April 7, 1932, within which to submit judgment to the Court for approval, which said order was and is in words and figures as follows:

Order Allowing Time to Submit Judgment.

The Court, having this day filed in Case No. 2062 Civil, Richard F. Cooper, Plaintiff, vs. Marshall S. Reynolds, Individually and as collector of Internal Revenue, a memorandum opinion which also covers the trial of this case, it is now ordered by the Court that thirty days from and after this date be, and the same are hereby, allowed within which the attorneys for the parties hereto may collaborate and submit form of judgment to be entered in this case.

Be it further remembered that on the 7th day of May, A. D. 1932, an order was duly entered enlarging the time to and including May 14, 1932, for counsel to prepare and submit judgment for the Court's approval, which said order was and is in words and figures as follows, to-wit:

Order Enlarging Time to Prepare and Enter Judgment.

The above-entitled matter coming on to be heard this day upon motion made in open court by Albert D. Walton, United States Attorney for the District of Wyoming, attorney for the defendant, for an order enlarging the time heretofore granted within which to prepare and enter judgment
55 herein, and good cause being shown therefor:

It is hereby ordered that the time within which the judgment in the above-entitled cause may be prepared and entered herein be, and the same is hereby, enlarged to and including the 14th day of May, A. D. 1932.

Dated this 7th day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that thereafter and on the 13th day of May, A. D. 1932, a judgment was entered in favor of

the plaintiff and against the defendant, which said judgment was and is in words and figures as follows, to-wit:

Judgment.

This cause having heretofore come on to be heard
56 before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury and the plaintiff having appeared by N. E. Corthell, her attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Attorney for the District of Wyoming, his attorneys, and the Court having taken the case under advisement, and having considered the stipulation of facts and the other evidence and the admissions made in open court, and having heard the argument of counsel and being fully advised:

The Court finds generally for the plaintiff, Barbara V. Cooper, and against the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the first cause of action for the sum of Two Hundred Eighty-three and 13/100 Dollars ($283.13) with interest at the rate of 6% per annum from June 19, 1929; upon the second cause of action for the sum of Five Hundred Eighty-five and 91/100 Dollars ($585.91) with interest at the rate of 6% per annum from December 15, 1926; and upon the third cause of action for the sum of One Thousand Seven Hundred Eight and 91/100 Dollars ($1,708.91) with interest at the rate of 6% per annum from December 15, 1927.

It is therefore considered and adjudged by the Court that the plaintiff, Barbara V. Cooper, do have and recover from the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the first cause of action the said sum of Two Hundred Eighty-three and 13/100 Dollars ($283.13) with interest at the rate of 6% per annum from June 19, 1929; upon the second cause of action for the said sum of Five Hundred Eighty-five and 91/100 Dollars ($585.91) with interest at the rate of 6% per annum from December 15, 1926; and upon the third cause of action
57 for the sum of One Thousand Seven Hundred Eight and 91/100 Dollars ($1,708.91) with interest at the

rate of 6% per annum from December 15, 1927; together with the costs of this action to be taxed.

To which finding and judgment and every part thereof the defendant excepted at the time; and the defendant is hereby given sixty days within which to prepare and file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collection of the income taxes for the recovery of which this action was brought.

Done in open Court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that on the 9th day of July, A. D. 1932, a motion was filed on behalf of the defendant for an extension of time within which to prepare and file his bill of exceptions and submit the same to the Court for approval, which said motion supported by affidavit of Albert D. Walton, of counsel for defendant, was and is in words and figures as follows, to-wit:

Motion for Further Extension of Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

Comes now the defendant above named by Albert D. Walton, United States Attorney for the District of Wyoming, and moves the Court for an order further enlarging the time within which defendant may prepare and file bill of
58 exceptions and present same to the Court for allowance to and including the 10th day of September, A. D. 1932.

This motion is based upon the affidavit of Albert D. Walton hereto attached and made a part hereof.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming.

Affidavit.

United States of America, District of Wyoming, State of Wyoming, County of Laramie—ss.

Albert D. Walton, being first duly sworn according to law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is the attorney for the defendant in the above entitled cause; that a judgment was entered against the defendant in the above entitled cause on the 13th day of May, A. D. 1932, and that in and by said judgment as entered the defendant was given sixty days from and after date of entry within which to prepare and file a bill of exceptions and present the same to the Court for allowance; that immediately upon the entering of said judgment affiant notified the Attorney General of the United States that judgment had been entered against the defendant in said cause, and sent a copy of said judgment to the said Attorney General, and requested advice as to whether appeal would be taken; that up to the date hereof, to-wit, July 9, 1932, the Attorney General has not advised affiant as to whether an appeal is to be taken in said cause; that owing to the fact that affiant has been busily engaged in the work connected with the office of the United States Attorney for the District of Wyoming since May 13, 1932, he has not had the opportunity to prepare said bill of exceptions, and owing to the business of said office now pending before said Court for disposition, affiant will be unable to prepare said bill of exceptions within the time allowed by the provisions of said judgment, but will be able to prepare, file, and present to the Court for allowance said bill of exceptions on or before September 10, 1932.

ALBERT D. WALTON.

Subscribed and sworn to before me this 9th day of July, A. D. 1932. (Seal) Clara H. Ahrens, Notary Public. My Commission expires February 5, 1934.

59 Be it further remembered that on the 9th day of July, A. D. 1932, an order was duly entered by the Court extending the time for defendant to prepare and file his bill of exceptions herein and present the same to the Court for approval, which said order was and is in words and figures as follows, to-wit:

Order Further Extending Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

The above entitled matter coming on to be heard this day upon the motion of the defendant praying for an order further extending the time within which defendant may prepare and file his bill of exceptions herein and present same to the Court for allowance, and good cause being shown therefor:

It is hereby ordered that the time within which the defendant may prepare and file his bill of exceptions herein and present the same to the Court for allowance be, and the same hereby is enlarged and extended to and including the 10th day of September, A. D. 1932.

Dated this 9th day of July, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that on the 1st day of September, A. D. 1932, a motion was made and filed by the defendant in the above entitled cause praying that an order nunc pro tunc be entered overruling defendant's motion for judgment and sustaining plaintiff's motion for judgment, in accordance with the Judge's Memorandum handed down on the 7th day of April, A. D. 1932, which said motion was and is in words and figures as follows, to-wit:

Motion for Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiff's Motion for Judgment.

Comes now Marshall S. Reynolds, Individually and
60 as Collector of Internal Revenue, and moves the Court that an order nunc pro tunc be entered herein overruling defendant's motion for judgment made and filed on the 7th day of January, A. D. 1932, and sustaining plaintiff's motion for judgment made and filed on the 7th day of January, A. D. 1932, effective as of date May 13, A. D. 1932, in accordance with the Judge's Memorandum handed down and dated on the 7th day of April, A. D. 1932, for the reason and upon the ground that through inadvertence such an order

has not been entered, nor did the judgment entered herein include the ruling upon said motions.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming.

Attorney for Defendant.

Be it further remembered that on the 1st day of September, A. D. 1932, an order nunc pro tunc overruling defendant's motion for judgment and sustaining plaintiff's motion for judgment was duly entered herein, which said order nunc pro tunc was and is in words and figures as follows, to-wit:

Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiff's Motion for Judgment.

The above entitled matter coming on to be heard this day upon the motion of the defendant above named praying that an order nunc pro tunc be entered overruling the defendant's motion for judgment and sustaining plaintiff's motion for judgment, pursuant to the Judge's Memorandum handed
61 down herein on the 7th day of April, A. D. 1932, and it appearing to the Court that in the said Judge's Memorandum the Court held and decided: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases."

And it further appearing to the Court that a judgment was entered in the above entitled case on the 13th day of May, A. D. 1932, in favor of the plaintiff and against the defendant, but through inadvertence the said judgment did not contain a provision sustaining plaintiff's motion for judgment and overruling the defendant's motion for judgment:

It is, therefore, ordered that the motion of the plaintiff for judgment herein filed on the 7th day of January, A. D. 1932, be, and the same hereby is, sustained, to which said

ruling the defendant duly excepts, and that the motion of the defendant for judgment in favor of the defendant filed on the 7th day of January, A. D. 1932, be, and the same hereby is, overruled and denied, to which said ruling the defendant duly excepts.

It is further ordered that this order be, and the same hereby is, effective from and after the 13th day of May, A. D. 1932, the date upon which judgment was entered in the above entitled cause.

Dated this 1st day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

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62 It is hereby stipulated and agreed by and between the parties hereto that the above and foregoing which is tendered by the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, as his bill of exceptions in the above-entitled cause, contains a full, true and correct statement of the evidence introduced in said cause, and a full, true and correct statement of all of the proceedings in the trial and disposition of said cause and the exceptions of the defendant had and taken in such proceedings, and that said tendered bill of exceptions may be approved, allowed, settled, and sealed as the bill of exceptions in this cause.

Dated this second day of September, A. D. 1932.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Order of Court Approving and Settling Bill of Exceptions.

Filed Sept. 2, 1932.

63 On this 2 day of September, A. D. 1932, and within the time allowed by the order of this Court heretofore duly made and entered, the defendant Marshall S. Reynolds, Individually and as Collector of Internal Revenue, tendered his bill of exceptions herein, together with a stipulation of counsel that the same might be approved, allowed and settled as the bill of exceptions in this cause;

And the Court, having duly considered and examined said bill of exceptions, and it being found that the exceptions are therein truly alleged, the same is by the Court hereby allowed, settled and approved and said bill of exceptions is hereby signed and sealed by the Honorable T. Blake Kennedy, the Judge of said Court before whom said proceedings were had, and the same is ordered by the said Court to be filed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Judge before whom said proceedings were had this 2 day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Election as to Printing Transcript.

Filed Sept. 13, 1932.

Comes now the above named defendant and appellant
64 and hereby elects to have the printing of the transcript on appeal in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 12th day of September, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant-Appellant.

Stipulation for Transcript.

Filed Sept. 13, 1932.

It is hereby stipulated and agreed by and between
65 the parties to the above entitled cause that the following portion of the record shall be included in the transcript, to-wit:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulation as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

This stipulation.

Praecipe for transcript.

Clerk's certificate.

It is further stipulated that the above is without
66 prejudice to either party to have any other portions of the record certified up if it should be necessary.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Praecipe for Transcript.

Filed Sept. 13, 1932.

To the Clerk of said Court:

You are hereby requested and directed to prepare
67 and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulation as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

Stipulation as to transcript.

Praecipe for transcript.

Clerk's certificate.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,

EWING T. KERR,
Assistant United States Attorney
for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of
Internal Revenue,

Attorneys for Defendant-
Appellant.

[Clerk's Certificate.]

United States of America, District of Wyoming—ss.

I, Charles J. Ohnhaus, Clerk of the District Court
68 of the United States within and for the District of Wyoming, do hereby certify the above and foregoing to be a true, correct and complete transcript and copy of the record and proceedings, and of all thereof, as called for by the praecipe for transcript filed herein, including the Judge's Memorandum, in a certain cause lately in said court pending, between Barbara V. Cooper, Plaintiff, and Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant, as full and complete as the same still remains on file and of record in my office at Cheyenne, Wyoming.

In witness whereof, I do hereunto sign my name and affix the seal of said Court at Cheyenne, in said district, this 15th day of September, A. D. 1932.

(Seal)

CHARLES J. OHNHAUS,
Clerk, United States District Court,
District of Wyoming.

Filed Sept. 21, 1932. Albert Trego, Clerk.

Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the January Term, 1933, of said court, before the honorable John H. Cotteral, Circuit Judge, the honorable George T. McDermott, Circuit Judge, and the honorable Tillman D. Johnson, District Judge.

Be it remembered that heretofore, to wit: on the 21st day of September, 1932, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Marshall S. Reynolds, individually and as collector of internal revenue, was appellant and Barbara V. Cooper was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit under the supervision of its clerk, is in the words and figures following, to wit:

65 And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Appearances

For appellant

The clerk will enter my appearance as counsel for the appellant.

ALBERT D. WALTON,
Cheyenne, Wyo.,
U. S. Attorney, Dist. of Wyoming.
EWING T. KERR,
Cheyenne, Wyo.,
Asst. U.S. Attorney, Dist. of Wyoming.
JOHN R. WHEELER,
Seattle, Wash.,
Special Attorney, Bureau of Internal Revenue.

Filed Sept. 24, 1932. Albert Trego, clerk.

The clerk will enter my appearance as counsel for the appellant.

ELDON O. HANSON,
Bureau of Internal Revenue, Washington, D.C.

Filed Jan. 9, 1933. Albert Trego, clerk.

66 For appellee

The clerk will enter my appearance as counsel for the appellee.

N. E. CORTHELL,
Laramie, Wyo.

Filed Sept. 24, 1932. Albert Trego, clerk.

Order of submission

No. 747, No. 748, No. 749

Second day, January term, Tuesday, January 10th, A.D. 1933

Before Honorable John H. Cotteral, circuit judge, Honorable George T. McDermott, circuit judge, and Honorable Tillman D. Johnson, district judge.

These causes came on to be heard, and by agreement of counsel, were argued together, Eldon O. Hanson, Esquire, appearing for appellant, and N. E. Corthell, Esquire, appearing for appellees.

On motion, appellant was granted leave to file twenty printed copies of a reply brief herein instanter, which was accordingly done. Appellant was also granted leave to file twenty printed copies of a supplemental reply brief within five days, appellees to file twenty printed copies of a supplemental brief in reply thereto within fifteen days thereafter.

Thereupon these causes were submitted to the court.

67 United States Circuit Court of Appeals, tenth circuit

No. 747, January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER, APPELLEE

No. 748, January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLETOR OF INTERNAL REVENUE, appellant

v.

BARBARA V. COOPER, APPELLEE

No. 749, January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLETOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER AND BARBARA V. COOPER, APPELLEES

[April 3, 1933]

Eldon O. Hanson, Special Attorney, Bureau of Internal Revenue (Albert D. Walton, U.S. Attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue; John R. Wheeler, Special Attorney, Bureau of Internal Revenue; and Percia E. Miller, Special Attorney, were with him on the brief) for appellant.

N. E. Corthell (A. W. McCullough and M. E. Corthell were with him on the brief) for appellees.

Before COTTERAL and MCDERMOTT, Circuit Judges, and JOHNSON, District Judge.

MCDERMOTT, Circuit Judge, delivered the opinion of the court.

Appellees are the beneficiaries of a trust set up by the will of their father. A part of the trust estate consists of a royalty interest

under an oil and gas lease on lands in Wyoming, the lease running from the father, the owner of the oil reserves. Appellees returned for income tax purposes the royalties received by them during the years 1923 to 1927, both inclusive. The trustees filed an information return only; the beneficiaries claimed the deduction for depletion, in an amount conceded to be reasonable, allowed by § 214(a) 10, Rev. Act of 1921, and the corresponding sections in the Revenue Acts of 1924 and 1926. The claim was disallowed in its entirety, the Commissioner taking the position that since the legal title stood in the name of the trustee, with directions to convert into cash at their discretion, appellees had no present or reversionary interest in the mineral estate, and were therefore not entitled to any depletion allowance. The tax was paid, under compulsion and protest, and this action brought to recover it. A jury was waived; the facts stipulated; the plaintiffs recovered, Judge Kennedy filing a memorandum opinion in which he took the common-sense view that the trustees were but conduits through which the income passed in its journey from the oil fields of Wyoming to the appellees. Cooper *v.* Reynolds (D.C. Wyo.) 60 F. (2d) 650.

The question presented is whether a beneficial interest in oil in place will support a claim for depletion, or whether the taxpayer must be vested with a present or reversionary interest in the legal title. It is true that the legal title vested in the trustees; it is true they were directed, at a time to be selected by them, to convert the interest into cash. But it is likewise true that, during the years in question, appellees were entitled to the undiminished income from the trust, and upon conversion in their lifetime, to share in the distribution of the proceeds. No one else has any beneficial interest in the royalties producing the taxable income; no one else has or claims any depletion allowance for the capital investment returned by way of such royalties. The question therefore is, Is depletion confined to those who hold a technical legal title?

The answer is found in the decisions of the Supreme Court of the United States, and of other courts. Depletion allowances are not dependent upon technical questions of title; they rest upon a broader base. If the taxpayer has an economic interest which is adversely affected by the production of oil, he may deduct depletion from the income received from that oil. Lynch *v.* Alworth-Stephens Co., 267 U.S. 364; Weiss *v.* Weiner, 279 U.S. 333; Palmer *v.* Bender, 287 U.S. 551. In the latter case, the taxpayer had assigned his lease, reserving only an over-riding royalty. In the cases at bar, appellees were entitled not only to the royalty, but to share in the proceeds of a sale if made in their lifetime. Equitable estates are not barred by either the statute or decisions. Commissioner *v.* Molter (C.C.A. 10), 60 F. (2d) 498; Merle-Smith *v.* Commissioner (C.C.A. 2), 42 F. (2d) 837, certiorari denied, 282 U.S. 897. In the latter case, the equitable interest was subject to extinction, but the taxpayer was held entitled to depletion while the interest lasted. To the same

effect, see Kuhn *v.* Commissioner, 24 B.T.A. 216; Alphin *v.* Commissioner, 21 B.T.A. 1101.

The decision of the Supreme Court of the United States in Anderson *v.* Wilson, — U.S. — (decided March 13, 1933) is cited by the appellant as opposed. There, as here, the legal title to the properties was in testamentary trustees; there, as here, the taxpayer was the beneficiary of the trust. The loss there was a capital loss arising from the sale of real estate by the trustees. It was held that the loss fell upon the trustees and not the beneficiary, and that the trustees were entitled to the deduction in their income-tax return.

There is language in the Anderson case which, taken out of its setting, supports the contention of appellant. The Supreme Court, however, sees no conflict between its opinion in the Anderson case and its opinion in Palmer *v.* Bender, handed down two months earlier, for the Palmer case is not cited, much less overruled. It is neither necessary nor proper for an inferior court to suggest a conflict where the Supreme Court has suggested none, nor, having suggested it, undertake to demonstrate its nonexistence. It may not be impertinent, however, in reply to appellant, to note that there is no irreconcilable inconsistency between the two decisions. One dealt with capital losses and held that the loss follows the title; the other dealt with depletion of minerals by the production which gave rise to the income, and held that questions of title were not controlling. In one, the trust was a taxpayer, entitled to claim the capital loss; in the other, the trust made no return except for the information of the Commissioner.

It will be enough for us to decide which of the two cases controls the cases at bar. Fortunately, that decision is not a difficult one. The Palmer case deals with the identical statute with which we are confronted. It deals with the depletion of oil reserves, as do our cases. In the Palmer case the taxpayer had no title either to the lease or the real estate; all he had was a contractual right to receive a part of the oil produced under a lease owned by another, from real estate owned by a third. In our cases the taxpayers have a testamentary right to receive a part of the oil produced under a lease owned by others—the trustees—plus a right to share in the proceeds of the royalty when and if sold. The legal questions presented are identical, except insofar as the appellees' case here is strengthened by their reversionary right. In the Palmer case the court declined to consider refinements of title. The court said:

"It has been elaborately argued at the bar and in the briefs whether under Louisiana law the two instruments are assignments or subleases. We do not think the distinction material. Nothing in § 214 (a) (10) indicates that its application is to be controlled or varied by any particular characterization by local law of the interests to which it is to be applied. . . . The formal attributes of those instruments or the descriptive terminology which may be applied to them in the local law are both irrelevant."

The court then considered whether the depletion statute was confined to any form of legal ownership, and gave its answer in these words:

"The allowance to the taxpayer is not restricted by the words of the statute to cases of any particular class or to any special form of legal interest in the oil well. . . . The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired by investment any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital. That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this court in Lynch *v.* Alworth-Stephens Co., 267 U.S. 364. . . . Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough, if by virtue of the leasing transaction he has retained a right to share in the oil produced. If so, he has an economic interest in the oil, in place, which is depleted by production. Thus we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. . . . Thus throughout their changing relationships with respect to the properties the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships, and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case."

This considered language, dealing with the particular statute here involved, is broad and unmistakable. The decision itself allowed depletion to one who had much less economic interest in the oil reserves than the appellees here. In the cases at bar, unlike the Anderson case, it is not a question of which taxpayer gets the allowance; in our cases, the depletion actually suffered by the royalty interest must be allowed to appellees or no allowance therefor made. We cannot ignore the Palmer case because of a supposed conflict between it and a later case dealing with another statute.

The Palmer case and its progenitors do no more than apply, to a new situation, the accepted philosophy that taxation is an intensely practical matter, and questions must be determined according to the truth and substance of the transaction, and not by the form it took.

Eisner *v.* Macomber, 252 U.S. 189; United States *v.* Phellis, 257 U.S. 156; Bowers *v.* Kerbaugh Emp. Co., 271 U.S. 170. The law recognizes equitable estates for the purpose of paying income taxes, Irwin *v.* Gavit, 268 U.S. 161; Anderson *v.* Wilson, supra; likewise it should and does recognize them for proper deductions from that income. The allowance claimed here was essentially just, for every barrel of oil produced lessened the eventual sale price of the property in which appellees may share; such production in fact depleted the reservoir of oil in which appellees had a substantial economic interest.

There is a subsidiary point, of minor importance, in no. 748. John Hartshorn Cooper, a brother of Barbara V. Cooper, and one of the beneficiaries of the trust created by their father's will, died in 1921. Barbara inherited part of her brother's interest in the royalties in question. His estate was closed on September 13, 1923. The estate was, therefore, the taxpayer until September 13, 1923, and Barbara was the taxpayer after that date. Bankers' Trust Co. *v.* Bowers (C.C.A. 2), 295 F. 89; Hoeper *v.* Tax Commission, 284 U.S. 206. The Commissioner apportioned the 1923 income between the two taxpayers according to the number of days included in each of the periods in question. The propriety of such method of apportionment if the Commissioner is unable to determine the actual income received by each of the taxpayers, is not questioned. On the other hand, the Commissioner should assess the income actually received by each of the taxpayers if it can be ascertained. Rules of thumb should only be resorted to in case of necessity, for the actual is always preferable to the theoretical. Doyle *v.* Mitchell Brothers Co., 247 U.S. 179, 187; Howbert *v.* Penrose (C.C.A. 10) 38 F. (2d) 577.

The point in disagreement is whether the record discloses that the Commissioner erred in resorting to an apportionment; that is, was the actual income of each taxpayer readily ascertainable? The record is not entirely satisfactory on the point, but the petition alleges that the Commissioner added to the appellee's taxes for the year 1923 the ifference between the income actually received by her, and the amount which would have been received by her if the income for the entire year had been prorated according to the calendar. This allegation is expressly admitted by the answer. The stipulation of facts recites that for the year 1923 the Commissioner's determination rested in part upon the "difference between the actual gross receipts as returned by the plaintiff, and the gross receipts as determined by the Commissioner by apportionment." In addition to the pleadings and the stipulation of facts, it is a matter of common knowledge that a record is kept of oil runs, both by the producing companies and by the pipe-line purchasers as the oil is marketed. From these records, a close approximation can be had as to the amount of production in any period of time. Furthermore, in all human probability, the trustees of this estate kept an accurate record of disbursements made by them to the estate of John Hartshorn Cooper, as well as an accurate record of the dis-

bursements made to Barbara V. Cooper. We therefore conclude that there is substantial evidence in the record to support the finding of the trial court on this question of fact.

Appellant filed a supplemental reply brief upon the question of interest, the contention being that because of section 319 of the Economy Act of June 30, 1932, the interest on this judgment should be reduced from 6 percent to 4 percent, at least after the effective date of the Economy Act. Huwe *v.* Ohmer Fare Register Company (C.C.A. 6), 61 F. (2d) 721; Caraleigh Phosphate & Fertilizer Works *v.* United States (Ct. Cl.) 1 F. Supp. 854. The point passes out of the case by virtue of section 2 of the First Deficiency Act of January 30, 1933. Title 2, § 2, of that act provides that "section 319 of the act of June 30, 1932, shall not apply to any judgment rendered against the United States prior to July 1, 1932."

The judgments are are affirmed.

68 *Judgment*

Thirty-seventh day, January term, Monday, April 3rd, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges.

The cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Motion to stay mandate

Comes now Marshall S. Reynolds, individually, and as collector of internal revenue, appellant in the above-entitled cause, and moves for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for a period of thirty (30) days, pending an application to the Supreme Court of the United States for a writ of certiorari.

Dated this 2nd day of May, A.D. 1933.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

69 EWING T. KERR,
Asst. United States Attorney for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Appellant.

Filed May 3, 1933, Albert Trego, clerk.

Order

Thursday, May 4th, A.D. 1933

Before Honorable Robert E. Lewis, senior circuit judge, at Denver, Colorado, the following proceedings were had:

This cause came on to be heard on the motion of appellant for a stay of the mandate herein.

On consideration whereof, and for good cause shown, it is now here ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supeme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

70

Motion to stay mandate.

Comes now Marshall S. Reynolds, individually and as collector of internal revenue, appellant in the above-entitled cause, and moves the court for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for an additional period of thirty days, pending an application to the Supreme Court of the United States for a writ of certiorari. This motion is based upon the affidavit of Albert D. Walton, which is hereto attached and made a part hereof.

Dated this 2nd day of June, A.D. 1933.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,
EWING T. KERR,
Asst. United States Attorney for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Appellant.

Filed June 3, 1933. Albert Trego, clerk.

71

Order

No. 747, No. 748, No. 749

Twentieth day, April term, Saturday, June 3rd, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, circuit judges.

These causes came on to be heard on the motion of appellant for a further stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

72 *Clerk's certificate*

United States Circuit Court of Appeals, Tenth Circuit

I, Albert Trego, clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Wyoming, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals wherein Marshall S. Reynolds, individually and as collector of internal revenue, was appellant and Barbara V. Cooper was appellee, No. 748, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the city of Denver, Colorado, this 20th day of June, A.D. 1933.

[SEAL]

ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

U. S. GOVERNMENT PRINTING OFFICE 1933

75 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for argument immediately following no. 225.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 749

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, APPELLANT,

vs.

RICHARD F. COOPER and BARBARA V. COOPER, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

FILED SEPTEMBER 21, 1932.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF WYOMING.

Pleas and Proceedings before The Honorable T. Blake Kennedy, Judge of the United States District Court for the District of Wyoming, presiding in the following-entitled cause:

RICHARD F. COOPER and BARBARA V. COOPER,

Plaintiffs,

Law vs. No. 2064

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, Defendant.

Be it remembered, that heretofore, and on, to-wit,
1 the 15th day of January, A. D. 1931, came Richard F. Cooper and Barbara V. Cooper, plaintiffs, by Corthell, McCullough and Corthell, their attorneys, and filed in said Court a petition against Marshall S. Reynolds, Individually and as Collector of Internal Revenue.

The said petition is in words and figures, as follows, to-wit:

Petition.

The plaintiffs allege the following facts for their
2 cause of action against the defendant:

1. Heretofore, to-wit, on the 14th day of March, 1924, the said Richard F. Cooper, as administrator of the estate of John Hartshorn Cooper, deceased, made and filed with the Collector of Internal Revenue for the District of Wyoming the return of taxable income for said estate for the period from January 1st to September 12th, 1923, inclusive. The lawful tax upon said return was $660.27, which amount was paid by said administrator to the defendant in full.

2. In said return the administrator included the sum of $8,858.73 as income from fiduciaries, being the distributive share accruing to and received as income by said estate from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the will of A. F. T. Cooper, deceased.

3. The right and interest of said estate with respect to which the said distributive share accrued to said estate was derived under the following provisions of said will and the codicil thereto, to-wit:

(Extract from original Will of A. F. T. Cooper:)

"14. I give, devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell, call in, collect and convert into money the said
3 real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession, unless it shall appear to my trustees that an earlier sale shall be beneficial), and so that they shall have the fullest power and discretion to postpone the sale, calling in, and conversion of the whole or any part or parts of the said premises during such period as they shall think proper, and to retain the same or any part thereof in its present form of investment without being responsible for loss, and shall out of the moneys to arise from such calling in or conversion, pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this will or any codicil hereto, and make provision for the duty on any legacies or annuities bequeathed free of duty, and shall hold the residue of such moneys after payment of legacy duty thereon—"

(Extract from Codicil of provision superseding residue of said paragraph 14 of original Will:)

"Upon trust as to the first twenty one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper, the sum of seven

thousand pounds to my son John Hartshorn Cooper, and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate, and as to the residue (if any) thereof, upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely, and as to one-fourth part or share for my said son John Hartshorn Cooper absolutely, and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper, but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1923 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of the taxable period (January 1st—September 12th, 1923), consisting of royalties
4 under the said lease and interest on funds in their hands, in the proportions of one-half to the said Richard F. Cooper, one-fourth to said estate of John Hartshorn Cooper and one-fourth to Barbara V. Cooper, or to her use.

5. The said trustees in March, 1924, made and filed with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $908.08 derived from interest on funds in the hands of the

trustees, and gross receipts of $87,240.39 accruing in 1923 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $43,608.67 and taxes and expenses amounting to $7,891.55, leaving as income, of the amount accruing, as aforesaid, from royalties, $35,740.17, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $36,648.25, from which the said amount of $8,857.73 returned by said administrator as income of said estate from said fiduciaries was derived.

6. Thereafter, to-wit, on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against said estate an additional income tax for the said taxable period (January 1st—September 12th, 1923) in the sum of $420.39. Such determination and assessment was based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the said administrator's return of the sum of $4,913.60, representing such proportion of the deductions for depletion on the fiduciary return as was applicable to the distributive share of said estate aforesaid. Such disallowance of depletion and addition to income were made under the asserted claim of the Commissioner that the said estate, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said Commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1923.

7. Thereafter, to-wit, on the 29th day of December,
5 1928, the defendant demanded payment by said estate, and by the plaintiffs herein, as distributees of said estate, of such additional tax, together with interest thereon amounting to $110.36, making a total of $530.75, and threatened to enforce such payment by distress upon the property of said estate and of the plaintiffs, whereupon, under compulsion and protest and involuntarily to prevent such distress, the plaintiffs, on December 29th, 1928, paid to the defendant the said sum of $530.75.

8. The plaintiffs allege that the disallowance of said de-

duction for depletion was unauthorized and unlawful; that the said estate and the plaintiffs were entitled to claim and take the benefit of the same in determining the net income of said estate; that the additional tax determined and assessed against the said estate, based on the disallowance of such deduction, was unauthorized and unlawful. The plaintiffs, therefore, allege that on, to-wit, the 29th day of December, 1928, the defendant, in manner aforesaid, became and was indebted to the plaintiffs for money then had and received by the defendant from the plaintiffs, to the use of the plaintiffs, in the said sum of $530.75, which said sum was then and there due and payable from the defendant to the plaintiffs; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on September 14th, 1929, the plaintiffs made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $530.75, with interest thereon, upon the grounds aforesaid, and demanded payment thereof. More than six months has elapsed since the said application was made and filed, as aforesaid.

Wherefore, the plaintiffs pray judgment against the defendant for the recovery of the said sum of $530.75, with interest thereon from December 29, 1928, at the rate of seven (7%) per cent per annum, and for costs, and all other proper relief.

CORTHELL, McCOLLOUGH & CORTHELL,
Plaintiff's Attorneys.

State of Wyoming, County of Albany—ss.

I, N. E. Corthell, being first duly sworn, say I am
6 one of the attorneys for the plaintiffs in the above entitled action. I have read the foregoing petition and know the contents thereof and I believe the facts therein stated to be true.

N. E. CORTHELL.

Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1931. (Seal) H. A. Baumbach Notary Public.

Answer.

Filed March 30, 1931.

Now comes Marshall S, Reynolds, the defendant,
7 by Albert D. Walton, United States Attorney for the District of Wyoming, and files this his answer to the petition heretofore filed by the plaintiff.

1. Defendant denies the allegation in paragraph 1 of plaintiffs' petition, and on the contrary defendant alleges that on the 15th day of March, 1924, a federal income tax return for the Estate of John Hartshorn Cooper, for the period from January 1 to September 12, 1923, inclusive, was made and filed with the Collector of Internal Revenue for the District of Wyoming, by N. E. Corthell; that said return disclosed a tax of $670.06; that on May 12, 1924, a further return was filed by the said N. E. Corthell, for the Estate of John Hartshorn Cooper for the period from January 1st to September 12, 1923, inclusive, which return disclosed a tax of $660.27.

2. Defendant admits the allegations in paragraph 2 of the plaintiffs' petition that in said return the administrator included the sum of $8,858.73 as income from fiduciaries. All other allegations in said paragraph defendant denies.

3. Defendant is without knowledge as to the facts set forth in paragraph 3 of the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts set forth in paragraph 4 of the petition and demands strict
8 proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the petition.

6. Defendant admits the allegations in paragraph 6 of the petition that on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against said estate an additional income tax for the said taxable period (January 1, to September 12, 1923) in the sum of $420.39; and that such determination was based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the

net income shown by the administrator return of the sum of $4,913.60. Defendant, however, denies each and every other allegation contained in said paragraph 6 of the petition.

7. Defendant admits that the defendant demanded payment by said estate and by the plaintiffs herein, as distributees of said estate of such additional tax, with interest in the sum of $110.36, making a total of $530.75, and that the plaintiffs on December 29, 1928, paid to the defendant the said sum of $530.75. Defendant, however, denies all other allegations contained in said paragraph 7 of the petition.

8. Defendant denies the allegations in paragraph 8 of the petition.

9. Defendant admits the allegations in paragraph 9 of the petition.

Wherefore defendant demands judgment that the petition be dismissed and for costs herein.

ALBERT D. WALTON,
United States Attorney,
Attorney for Defendant.

United States of America, District of Wyoming—ss.

Albert D. Walton, being of lawful age, and being
9 first duly sworn according to law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is attorney for the defendant in the above-entitled cause; that he has read the above and foregoing answer and knows the contents thereof, and that all of the facts therein stated and allegations therein contained are true, as he verily believes.

ALBERT D. WALTON.

Subscribed in my presence and sworn to before me this 30th day of March, A. D. 1931. Capitola G. Allison, Deputy Clerk, U. S. District Court for the District of Wyoming.

Stipulation of Waiving of Trial by Jury.

Filed May 11, 1931.

It is hereby stipulated by and between the parties
10 to the above entitled cause and their respective attorneys that the said cause may be tried to the Court without the intervention of the jury, trial by jury being hereby expressly waived.

Dated this 11th day of May, 1931.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

Attorney for Defendant.

Richard F. Cooper, Plaintiff, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2062, Civil-Law.

Barbara V. Cooper, Plaintiff, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2063, Civil-Law.

Richard F. and Barbara V. Cooper, Plaintiffs, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, No. 2064, Civil-Law.

Filed April 7, 1932.

Corthell, McCullough & Corthell of Laramie, Wyo.,
11 for Plaintiffs.

Albert D. Walton, U. S. Attorney, of Cheyenne, Wyo., John R. Wheeler, Special Attorney, C. M. Charest, General Counsel, and Percia E. Miller, Special Attorney, all of the Bureau of Internal Revenue, of Washington, D. C., for Defendant.

Judge's Memorandum.

Decided April 7, 1932.

KENNEDY, District Judge.

These are cases in which the plaintiffs are seeking to recover

income taxes assessed by the Commissioner in the nature of deficiencies and paid under protest, appropriate demands having been subsequently made to refund the same and refused. After issues were joined, the causes were tried and submitted together upon a stipulation of facts, jury
12 being waived. Trial briefs have been filed.

The matter raises a rather controversial point of law which will undoubtedly invite a review by an appellate court, so that an extended rehearsal of the facts by this court would seem unnecessary in the light of their being stipulated. Suffice it to say, that the question presented for determination is, as to whether or not the plaintiffs as beneficiaries under a trust created by the will of one Arthur Francis Thomas Cooper are entitled to an allowance for a depletion as applied to their proportionate shares of funds accruing from oil royalties collected by said trust and distributed to them as such beneficiaries. Such depletion was claimed by plaintiffs for various years, extending from the year 1923 to the year 1928, and under the stipulation as I view it, the amounts sought to be recovered by the plaintiffs are the identical amounts paid as taxes by said plaintiffs under protest, representing the deductions for depletion, the computation of such depletion not being in dispute. Except as there may be possible corrections to be made on account of tax computations, the same general principle underlies the determination of the question as a matter of law in each case and therefore this memorandum will not discuss details.

The various income tax statutes under which the Commissioner purported to assess the tax for the several years are substantially the same as applied to the point under consideration.

The will, so far as its pertinent portions are here concerned, provides as follows:

> "14. I give devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees Upon trust that my trustees shall sell call in collect and convert into money the said real

and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to
13 arise from such calling in or conversion pay my funeral and testamentary expense and my debts and the legacies and annuities bequeathed by this my will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon as to the first sixty thousand pounds thereof Upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof. Upon trust to pay one equal third share to each of my said children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) Upon the trusts declared concerning the first sixty thousand pounds."

"15. I hereby declare that my trustees shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same Upon trust to invest the same in any of the securities authorized by this my will with full power to sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death Upon trust for all or such one or more exclusively of the

others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages of times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment Upon trust for all or any the children or child or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females shall attain the age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

"16. I hereby declare that in the event of my daughter dying without leaving any issue her surviving my trustees shall hold the said trust premises upon trust for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the direction of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares and so that the division shall be per stirpes and not per capita Provided that any share appointed to any child of mine or my said daughter or his or her issue under

the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the un-appointed part of the said trust premises.

"17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken had he or she survived me if more than one in equal shares per stirpes and not per capita.

"18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees Upon trust for the survivor of them absolutely."

As I view the situation here presented, the determining factor in the matter of the validity of the tax, is as to whether the plaintiffs as beneficiaries under said trust have or have not an interest in the corpus covered by the trust. If they have such an interest the depletion is properly deductible and the tax is improperly assessed; while on the contrary, if they have no interest in such corpus, the depletion charged is not deductible and the taxes are proper.

That the disagreement arises over oil royalties of which the testator was possessed and the proceeds from which have subsequently come into the trust, is not in dispute. The income tax figures were arrived at by the fiduciary deducting

from the royalties the properly computed depletion which in turn was claimed in proportionate amounts by the beneficiaries in the computation of their income.

The provisions of the will concerning the trust features, construed as free from legal technicality, amount to the mere passing of the income accruing from the royalties through the trust to the beneficiaries and therefore in substance, the situation is the same as though the beneficiaries were receiving such royalties direct, in which latter situation there could be no doubt that the beneficiaries would be entitled to a deduction by way of appropriate depletion in connection with this class of property. To hold otherwise would mean in substance that such beneficiaries were paying a tax on property, which is not within the contemplation nor is it permissible under the provisions of the Sixteenth Amendment and the statutes enacted thereunder.

Further elaboration of the views of this Court concerning the rule of law to be applied to the trust under consideration would serve no useful purpose. I am unable to distinguish on principle this case from the case of Merle-Smith v. Commissioner, 42 Fed. (2d) 837, in which case certiorari was denied by the Supreme Court. 282 U. S. 897. Depletion was there allowed the beneficiaries.

It should be remembered that tax statutes in case of doubt are most strongly construed against the Government. Gould v. Gould, 245 U. S. 151; United States v. Merriam, 263 U. S. 179; Burnet v. Niagara Falls B. Co., 282 U. S. 648; and that in applying the provisions of the income tax laws matters of form should be disregarded for those of substance. United States v. Phellis, 257 U. S. 156.

Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinbefore stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases.

Richard F. Cooper, and Barbara V. Cooper, Plaintiffs, vs. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2064 Civil.

Judgment.

Filed May 13, 1932.

This cause having heretofore come on to be heard
16 before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury, and the plaintiffs having appeared by N. E. Corthell, their attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Atttorney for the District of Wyoming, his attorneys; and the Court having taken the case under advisement, and having considered the stipulation of facts and the other evidence, and the admissions made in open court, and having heard the argument of counsel, and being now fully advised:

The Court finds generally for the plaintiffs, Richard F. Cooper and Barbara V. Cooper, and against the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the cause of action set forth in the petition for the sum of Five Hundred Thirty and 75/100 Dollars ($530.75) with interest at the rate of 6% per annum from December 29, 1928.

It is therefore considered and adjudged by the Court that the plaintiffs Richard F. Cooper and Barbara V. Cooper do have and recover from the defendant, Marshall S. Reynolds,
Individually and as Collector of Internal Revenue, the
17 said sum of Five Hundred Thirty and 75/100 Dollars ($530.75), together with interest at the rate of 6% per annum from December 29, 1928, together with the costs of this action to be taxed.

To which finding and judgment the defendant excepted at the time; and the defendant is hereby allowed sixty days within which to file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collection of

the income taxes for the recovery of which this action was brought.

Done in open court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Petition for Appeal.

Filed Aug. 8, 1932.

The above-named defendant, Marshall S. Reynolds,
18 Individually and as Collector of Internal Revenue, petitioner herein, feeling himself aggrieved by the order and judgment entered in the above-entitled cause on the 13th day of May, A. D. 1932, in favor of the plaintiffs in the above-entitled action and against the defendant herein, wherein and whereby it was ordered and adjudged that plaintiffs have judgment against the defendant, does hereby appeal from said order and judgment entered on the 13th day of May, A. D. 1932, and from the whole thereof to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons and upon the grounds specified in his assignment of errors filed herein, and defendant prays that this, his petition for appeal, and his said appeal may be granted and allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said order and judgment was made and entered, duly authenticated may *be* sent to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 8th day of August, A. D. 1932.

MARSHALL S. REYNOLDS,
Individually and as Collector of Internal Revenue, Defendant.

By ALBERT D. WALTON,
19 United States Attorney for the District of Wyoming.

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Assignment of Errors.

Filed Aug. 8, 1932.

Marshall S. Reynolds, Individually and as Collector
20 of Internal Revenue, defendant in the above-entitled cause, by Albert D. Walton, United States Attorney for the District of Wyoming, Ewing T. Kerr, Assistant United States Attorney for the District of Wyoming, and John R. Wheeler, Special Attorney for the Bureau of Internal Revenue, his attorneys, having filed petition for appeal, as provided by law, that defendant appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final order and judgment made and entered in said cause on May 13, 1932, in favor of the plaintiff and against the defendant herein, now makes and files in support of said appeal the following assignment of errors upon which it will rely for reversal of said final order and judgment upon the said appeal, which said errors, and each and every one of them, are to the great detriment, injury and prejudice of this defendant, and defendant says that in the records and the proceedings on the hearing and determination of this cause in the District Court of the United States for the District of Wyoming there are manifest errors in this, to-wit:

I.

The Court erred in holding that the sum of $4,913.60
21 claimed by plaintiffs as deduction for depletion was not income to plaintiffs for the period from January 1st to September 12th, 1923 inclusive.

II.

The Court erred in holding that the sum of $420.39 assessed as additional income of plaintiffs for the period January 1st to September 12th, 1923, and which together with interest in the sum of $110.36, was collected from plaintiffs, was illegally assessed and illegally collected.

III.

The Court erred in overruling defendant's motion for judgment in favor of defendant.

IV.

The Court erred in allowing and granting plaintiffs' mo-

tion for judgment in favor of plaintiffs, and against the defendant.

V.

The Court erred in making and entering judgment in favor of the plaintiffs and against the defendant.

Therefore, defendant prays that the said order and judgment entered herein, as aforesaid, in favor of the plaintiffs and against the defendant, be set aside, annulled, reversed and held for naught, and that said cause be remanded to the District Court for further proceedings in the premises, and for such other and further relief to which the defendant may be entitled.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Order Allowing Appeal.

Filed Aug. 8, 1932.

The above-entitled cause coming on regularly to be
22 heard upon the petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the above-named defendant, praying that an appeal be allowed herein from the order and judgment made and entered herein on May 13, A. D. 1932, and for the reversal of said order and judgment, and said petitioner having filed herein and presented to this Court his said petition for appeal and an assignment of errors relied on and intended to be urged by him upon said appeal, and it appearing to the Court that petitioner is entitled to said appeal:

Now, therefore, on motion of Ewing T. Kerr, Esquire, Assistant United States Attorney for the District of Wyom-

ing, of counsel for the petitioner, it is ordered that the said petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, defendant above named, for appeal from said order and judgment made and entered on May 13, A. D. 1932, be, and the same hereby is, granted, and the said appeal be, and the same hereby is, allowed without the filing of an appeal bond by or on behalf of said defendant.

Dated this 8th day of August, A. D. 1932.

T. BLAKE KENNEDY, Judge.

[Citation in proper form, directed to appellees, with acceptance of service by counsel for said appellees, was filed in the District Court on Aug. 11, 1932.]

BILL OF EXCEPTIONS.

Filed Sept. 2, 1932.

Be it remembered that on the 7th day of January,
25 A. D. 1932, at ten o'clock A. M. of said day, the above entitled cause came on for trial before the Court without the intervention of a jury, a trial by jury having been waived in writing, the Honorable N. E. Corthell appearing as attorney for plaintiffs, and Albert D. Walton, United States Attorney for the District of Wyoming, and the Honorable John R. Wheeler, Special Attorney, Bureau of Internal Revenue, appearing on behalf of defendant.

After opening statements by counsel the following proceedings were had:

A stipulation of facts having been filed in this cause was offered and received in evidence and is as follows:

Stipulation of Facts.

It is hereby stipulated and agreed by and between
26 the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. On March 15, 1924, a federal income tax return for the Estate of John Hartshorn Cooper, deceased, for the period from January 1st to September 12, 1923, inclusive, was made and filed with the Collector of Internal Revenue by N. E. Corthell, as agent, and thereafter on May 12, 1924, an amended return for the said period was filed by N. E. Corthell, as agent, for the Estate of John Hartshorn Cooper, deceased. The income tax of $660.27 shown on said amended return was paid in full.

2. In said return there was included the sum of $8,858.73, as income from fiduciaries claimed by the plaintiff to represent the distributive share of said estate of the income from the trust established under the will of A. F. T. Cooper, deceased.

3. The right and interest of said estate with respect to which its distributive share accrued to said estate was derived under the will and codicil thereto of said A. F. T. Cooper, a copy of which is hereto attached and marked Exhibit A, and by reference made a part hereof as though fully set out at this point.

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. A copy of said lease is attached hereto and marked Exhibit B and by reference hereto is made a part hereof. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustee had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had
27 discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during 1923 and subsequent years the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1923 and subsequent years, consisting of royalties under the said lease and interest on funds in their hands, in the manner following, to-wit: The receipts accruing prior to September 13, 1923, when said estate was settled and distributed, in the proportion of one-half to Richard F. Cooper, one-fourth to the said Estate of John

Hartshorn Cooper and one-fourth to Barbara V. Cooper or to her use.

5. For the taxable year 1923, the trustees made and filed with the Collector of Internal Revenue a fiduciary information return. The return so filed showed gross income of $88,148.47, consisting of interest on funds in the hands of the trustees and gross receipts from oil and gas royalties under said lease. From the aggregate gross income the trustees in said return, deducted taxes and expenses paid amounting to $7,891.55 and they also deducted depletion in the sum of $43,608.67, resulting in a net income of $36,648.25, from which amount of the net income the shares of the Estate of John Hartshorn Cooper, deceased, as stated in the fiduciary return, was derived. The amount of said income of said estate was stated by the fiduciary to be $8,857.73.

6. On October 12, 1928, the Commissioner of Internal Revenue determined and assessed against said Estate of J. H. Cooper an additional income tax for the said taxable period, January 1—September 12, 1923, in the sum of $420.39. Such determination and assessment were based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return of the trustees for depletion of the oil and gas properties from which the royalties aforesaid were derived and the addition to the net income shown by the administrator's return for said estate of the sum of $4,913.60.

7. If the contention of the plaintiffs that depletion
28 is lawfully allowable to the plaintiffs is determined by the Court in their favor, then the deduction to be allowed from gross income of the plaintiffs on account of depletion for the year 1923 is the amount which has been claimed in the Federal income tax return filed for that year and which is as follows:

1923	$4,913.60

It is, however, agreed that the defendant objects to the materiality, competency or relevancy of the above amount of depletion inasmuch as the defendant contends that under the provisions of the will of A. F. T. Cooper, as properly construed, the plaintiffs have no present property interest in the

corpus which would warrant the right to a depletion deduction, or serve as a basis for a depletion deduction.

8. On December 29, 1928, the defendant demanded payment by said estate and by the plaintiffs herein as distributees of said estate of such additional tax of $420.39, together with interest thereon amounting to $110.36, making total of $530.75; whereupon under compulsion and protest the plaintiffs, on December 29, 1928, paid to the defendant the said sum of $530.75.

9. On September 14, 1929, the plaintiffs made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $530.75, with interest thereon, upon the grounds aforesaid and demanded payment thereof. More than six months elapsed after the said application was made and filed prior to the commencement of this action.

N. E. CORTHELL,
Attorney for Plaintiffs.

ALBERT D. WALTON,
United States Attorney,

JNO. R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Exhibit A.

This is the last Will and Testament of me Arthur
29 Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby, England.

1. I hereby revoke all former wills and testamentary dispositions made by me and declare this to be my last will and testament.

2. I appoint my son Richard Francis Cooper and my brother in law the Reverend Christopher Barber Collinson and Edgar Percy Lewis of No. 32 Queen Victoria Street in the city of London Solicitor to be the executors and trustees of this my will and they and the survivor of them and the executors and administrators of such survivor his and

their assigns or other the trustees or trustee for the time being of this my will are hereinafter referred to as "my trustees".

3. I give to the said Reverend Christopher Barber Collinson a legacy of five hundred pounds free of legacy duty and to the said Edgar Percy Lewis a legacy of two hundred pounds free of legacy duty if they shall prove this my will and any codicil or codicils I may make thereto and act in the trusts thereof.

4. I bequeath the use and enjoyment of all articles of personal or domestic or household or stable or garden use or ornament belonging to me to my wife Jane Mary Evelyn Cooper during her life she keeping the same properly insured against loss or damage by fire and after her death but subject to the exercise of the power of gift hereinafter given to my said wife I bequeath the same to my said son Richard Francis Cooper. And I declare that it shall not be necessary for my trustees to take any inventory of the articles bequeathed by this clause and that my trustees shall not be concerned to see to the insurance thereof or be liable for any loss or damage that may happen thereto from any cause whatever. And I expressly declare that my said wife shall have full liberty during her lifetime to give any or all of my big game or other trophies to my son Richard Francis Cooper and to him and either of my other children any of the articles (other than the said big game and other trophies) bequeathed to her for life by this clause.

5. I give devise and bequeath subject to my wife's life interest therein the ten thousand pounds or other the investments for the time being representing the husband's fund of the settlement made on my marriage with my present wife in one thousand eight hundred and ninety-nine equally to and amongst my three children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts hereinafter declared in clause 15 hereof.

6. I give to my daughter Barbara Violet Cooper the sum of five thousand pounds free of legacy duty to be paid in priority to all legacies bequeathed by this my will and to be held by my trustees upon the trusts hereinafter declared concerning the same in clause 15 hereof.

7. I give to my old and faithful servant Philip Austin a legacy of one hundred pounds free of legacy duty.

8. I bequeath to the said Philip Austin, an annuity of one pound a week and to my old servant Jessie Oliver an annuity of ten shillings a week. Both annuities are to be free from death duties and are to commence from the day of my death and to be payable weekly and the first payments thereof are to be made as soon as my trustees can conveniently make the same immediately after my death.

9. Provided always and I declare that if any act or event shall happen in my lifetime or after my death whereby the said annuities or either of them would if belonging absolutely to the said Philip Austin or the said Jessie Oliver respectively become vested in or charged in favour of some other person or persons or a corporation then such annuity shall cease as if he or she were dead. Provided always and I declare that my trustees shall not be liable or responsible for paying the annuities hereinbefore bequeathed to the said Philip Austin and Jessie Oliver or either of them after the determination during his or her lifetime of the trust hereinbefore declared in his or her favour unless or until my trustees shall have received express notice of the event causing such failure or determination.

10. I authorize my trustees in case at any time with a view to the due administration or distribution of my estate it shall be deemed convenient so to do to appropriate and retain a sufficient part of my estate or the investments representing the same for answering by the annual income thereof any annuity hereinbefore bequeathed but without prejudice to the powers of sale and investment and transposing investments hereinafter contained and I declare that if the annual income of the appropriated fund shall at the time of appropriation be sufficient to satisfy such annuity such appropriation shall be a complete satisfaction of the trust to provide for such annuity and that if the income of the appropriated fund shall at any time and from any cause whatever prove insufficient for payment of such annuity in full resort may be had to the capital thereof from time to time to make up such deficiency and the surplus income (if any) of the said fund from time to time after the payment of the said annuity shall be applicable as income of my residuary estate.

And I declare that as and when such annuity shall cease the appropriated fund shall sink into my residuary estate.

11. I give to my trustees the sum of ten thousand pounds free of legacy duty upon trust to invest the same in any of the stocks shares and securities authorized by this my will and with power from time to time to vary such investments as they may see fit and to pay the income arising from such investments to my said wife Jane Mary Evelyn Cooper during her life for her own separate use and without power of anticipation and from and after her death upon trust as well income as capital for my two sons Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

12. Whereas I have in the events that have happened a power of appointment over the funds subject to an indenture of settlement dated the eighteenth day of June one thousand eight hundred and eighty-eight made on my marriage with my late wife Dorothy Jane Collinson now therefore I hereby appoint that the trustees for the time being of the said settlement shall stand possessed of the investments for the time being representing the fund subject to the trusts of such settlement upon trust as to one equal third share for my son Richard Francis Cooper and as to another equal third share for my son John Hartshorn Cooper and as to the remaining equal third share for my daughter Barbara Violet Cooper absolutely. Provided always and I hereby declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue then I appoint that the one-third share of the one so predeceasing me shall be held upon trust for the other of them and in the event of their both predeceasing me without leaving issue I appoint that their one-third shares shall be held upon trust for the said Barbara Violet Cooper absolutely. And I also declare and appoint that in the event of the said Barbara Violet Cooper predeceasing me without leaving issue that her one-third share shall be held upon trust for the said Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

13. I devise and bequeath all my freehold land messuages and premises known as the Culland Hall estate in the county of Derby unto and to the use of my trustees upon trust for my wife Jane Mary Evelyn Cooper for life and from and

after her death upon trust for my said son Richard Francis Cooper his heirs and assigns forever.

14. I give devise and bequeath all the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell call in collect and convert
31 into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to arise from such calling in or conversion pay my funeral and testamentary expense and debts and the legacies and annuities bequeathed by this my will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon as to the first sixty thousand pounds thereof upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof upon trust to pay one equal third share to each of my said children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) upon the trusts declared concerning the first sixty thousand pounds.

15. I hereby declare that my trustee shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same upon trust to invest the same in any of the securities authorised by this my will with full power to

sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in the lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any the children or child or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females shall attain that age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

16. I hereby declare that in the event of my daughter dying without leaving any issue her surviving my trustees shall hold the said trust premises upon trust for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares and so that the division shall be per stirpes and not
32 per capita. Provided that any share appointed to any

child of mine or my said daughter or his or her issue under the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the unappointed part of the said trust premises.

17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken had he or she survived me if more than one in equal shares per stirpes and not per capita.

18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for the survivor of them absolutely.

19. I declare that all estate duty on my Culland Hall estate and death duties on my foreign and colonial property (if any) and all legacy duty payable in respect of any devise legacy or annuity under this my will consequent on my death but not on the death of any life tenant or annuitant shall be paid out of my residuary estate.

20. I hereby declare that the said Edgar Percy Lewis or any trustee being a solicitor or any other person engaged in any profession or business may be employed to act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts hereof including acts which a trustee could have done personally.

21. My trustees shall invest in their names all monies which for the time being may be subject to the trusts of this my will and requiring investment in or upon (a) The public stocks or funds or government securities of the United Kingdom or of India or of any British colony or dependency or state or of any foreign government or state (b) Freehold copyhold or chattel real securities in England Scotland or Wales (c) The bonds debentures debenture stock mortgage obligations or securities or the guaranteed or preference or ordinary or preferred ordinary or deferred ordinary stock or shares of any company incorporated or registered in or under the legislature of the United Kingdom or of India or of any British colony or dependency or state or of any foreign country or state on which there is no liability and provided that interest or dividends shall for the three years immediately preceding the date of investment have been regularly paid by any such company on its ordinary stock or shares (d) The securities of any public or municipal or local body or authority in the United Kingdom or in any British colony or dependency or state or in any foreign country or state.

22. I hereby appoint my trustees trustees for all the purposes of the Settled Land Acts 1882-1890 and section 42 of the Conveyancing Act 1881.

23. I hereby declare that all gifts legacies devises
33 and share of residue given to my said sons and daughter are in addition to any gifts made to them during my lifetime unless I have in making any such gift declared in writing to the contrary. In Witness Whereof I have to this and the five preceding sheets of paper hereunto set my hand this eighteenth day of June one thousand nine hundred and eighteen.

ARTHUR FRANCIS THOMAS COOPER.

Signed by the said Arthur Francis Thomas Cooper the testator as and for his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—J. F. Talley—C. J. Walsh—) Clerks to Messrs g f hudson matthews 7 co 32 queen victoria street London e c 4 Solrs.

This is a first codicil to the last will and testament dated the eighteenth day of June one thousand nine hundred eighteen of me Arthur Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby Esquire.

1. I hereby declare that my trustees shall have full power of postponing for any length of time as in their uncontrolled discretion they may think fit the realization of the oil rights under my ranch in Wyoming U. S. A., without being liable for any loss arising therefrom and of deciding what proportion of the annual receipts therefrom shall be treated as capital and what proportion as income and their decision shall be considered for all purposes as final.

2. I hereby revoke that part of clause 14 of my said will which succeeds the words "and shall hold the residue of such moneys after payment of legacy duty thereon" and in lieu and stead thereof I declare that clause 14 shall read from and after such words as follows, viz:

"Upon trust (as to the first twenty-one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper the sum of seven thousand pounds to my son John Hartshorn Cooper and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate and as to the residue (if any) thereof upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely and as to one fourth part or share for my said son John Hartshorn Cooper absolutely and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

3. I declare that if my residuary estate without the value of my said oil rights is not equal to twenty-one thousand pounds my trustees shall until the realization of my oil rights or sufficient of them to produce with the rest of my residuary estate the said sum of twenty-one thousand pounds mentioned in clause 2 hereof or the expiration of twenty-one years after my death whichever shall be the shorter period

pay out of the annual income from my residuary estate to each of my said sons during his life the sum of three hundred and fifty pounds less income tax or if such income is insufficient to pay such sums divide the same equally between my said sons and accumulate the balance in any year in which the income shall be more than sufficient for the payment of the said sum of three hundred and fifty pounds and such accumulations shall be considered as capital monies and held upon the trusts declared concerning my residuary estate.

4. I declare that if after the payment of the said sum of twenty-one thousand pounds all my oil rights have not been realized my trustees shall value my daughters one-fourth share of such oil rights and shall pay to her out of
34 the monies received each year from such oil rights a sum equal to ten per cent free of income tax on such value and accumulate the balance (if any) and such accumulations shall be considered as capital monies and held upon the trusts declared concerning her said trust legacy of five thousand pounds.

5. In all other respects I confirm my said will.

In Witness whereof I have hereunto subscribed my name this twelfth day of November one thousand nine hundred and eighteen—Arthur Francis Thomas Cooper—Signed by the said Arthur Francis Thomas Cooper as and for a first codicil to his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—F. B. Hulke—Admiralty House Deal Surgeon—M A Tucker Evans 22 Langham Street London Nursing Sister.

Exhibit B.

Copy

This Memorandum of Agreement made the ninth
35 day of October, 1917, between Frank Cooper and Frank O. Harrison, as Trustee for the use of said Frank Cooper, parties of the first part, and The Ohio Oil Company, a corporation, formed under the laws of Ohio, of Casper, Wyoming, party of the second part, Witnesseth:

1. The first parties have granted to the second party the exclusive privilege to prospect and explore for oil and gas and to develop and produce oil and gas on the following described lands of the parties of the first part, to-wit:

All of Sections One (1), Two (2), Three (3), Eleven (11), Thirteen (13), Fifteen (15), Twenty-three (23), and the West Half of the West Half (W½W½) of Section Twelve (12), and the West Half of the Northwest Quarter (W½NW¼), the Southeast Quarter of the Northwest Quarter (SE¼NW¼), and the Northwest Quarter of the Southwest Quarter (NW¼SW¼) of Section Fourteen (14), all in Township Nineteen (19) North of Range Seventy-eight (78) West, and the North Half (N½), the West Half of the Southeast Quarter (W½SE¼), and the Southwest Quarter (SW¼) of Section Twenty-seven (27), and the South Half (S½) of Section Thirty-five (35), all in Township Twenty (20) North of Range Seventy-eight (78) West of the Sixth Principal Meridian, all situated in Carbon County, Wyoming.

The second party may employ all lawful and usual means to discover, develop and produce oil and gas upon said lands, and shall forthwith enter upon such undertaking and prospect, drill, explore for, develop and produce the same with all usual and reasonable diligence continuously during the continuance of this agreement.

It is understood between the parties that the parties of the first part herein have heretofore conveyed away all their right, title and interest in said lands "excepting and reserving however unto the said Frank Cooper, and unto the said Frank O. Harrison, as Trustee, for the use of said Cooper, and to their heirs, successors and assigns all oil and all gas underlying the said lands or any of them with the perpetual right to explore for, develop, extract and take away the same".

It is especially agreed that the second party shall in all things keep within the rights so excepted and reserved, and shall not interfere with the rights of the prior grantees of said Cooper and Harrison.

2. This agreement, unless sooner terminated for cause, shall continue for the period of twenty (20) years from the date hereof. In the event that oil or gas in paying quantities is being produced at the expiration of the 20-year period

aforesaid, the second party shall be entitled to an extension of said period for a further term of twenty years, upon like conditions, but the royalty payments during such extended period shall be at the rate of twenty per cent (20%).

3. The second party will pay to the first parties the sum of one hundred dollars ($100.00) as a minimum rental for each full section of said lands or the equivalent of a full section for each year during the continuance of this agreement. Each of said payments shall be applied on the percentage, if any, to be paid within the year to the first parties as herein provided.

4. In the event that the production of oil and gas in any year shall not be sufficient to compensate the minimum payment for such year, then such payment shall be taken to be rental for the said premises for such time as the same shall have been occupied within such year.

5. At all times during the continuance of the privilege hereby granted the second party shall prosecute the
36 work of discovery, development and production of oil and gas with diligence suitable to the undertaking and adequate to realize the full benefit of the natural resources of said lands, practicing the best and most approved appliances employed in the same or similar fields for such purposes, and using due care to see that the oil and gas within said lands shall be produced from wells within the limits thereof and not drained away through wells on neighboring lands. It is the intent of this agreement that the second party shall develop and produce oil and gas from all the various oil or gas bearing strata in said lands of whatsoever depth within practicable limits. No waste shall be permitted. Loss by fire, explosion or other casualty shall be carefully guarded against. Adequate facilities for storage and transportation shall be provided. If devices for the conversion of gas into oil shall be employed or shall be practicable in the same or similar fields, such appliance shall be put in use on said premises, all by the second party. The second party shall drill at least one well at a convenient and promising location to be selected by it near the dividing line between said Sections 2 and 35, to a sufficient depth to reach the supposed oil bearing sands in that region corresponding to the so-called Frontier sand in the Lost Soldier field or

the Wall Creek sand in the Salt Creek field in Wyoming, not exceeding, however, a depth of three thousand feet (3,000). The drilling of such well shall be commenced within sixty (60) days after acceptance by the first parties of this agreement, and drilling shall be prosecuted with all reasonable diligence continuously thereafter and the drilling of such well shall be completed within six months from the time of commencement. During the second six months not less than one additional well shall be drilled by the second party as above specified; during each subsequent six months not less than two additional wells. On default in these requirements the first party may terminate this agreement, offsetting wells shall be drilled by second party against each foreign well within three hundred (300) feet of the boundary line.

6. The second party shall keep full and accurate logs of all drillings; full and complete accounts and records of all discoveries, production and disposition of oil and gas, and accurate accounts of all expenditures in the aforesaid undertakings. At all times free access shall be given to the first parties or their representatives to the premises and to the logs, accounts and records in any way relating to the same. As soon as practicable after the close of each month the second party will make full and accurate reports to the first parties as may be required touching all matters in any way connected with this agreement; and like special reports shall be made whenever requested. All such reports shall be verified by some responsible agent of the second party having actual knowledge of the facts.

7. The second party shall deliver to the first parties as produced during the first year twelve and a half per cent (12½%); during the second year thirteen per cent (13%); during the third year thirteen and a half per cent (13½%) and so on, increasing each year one-half of one per cent of all oil or gas produced from the said premises, for first ten years, after which the royalty interest shall be twenty per cent (20%) during the remainder of this lease or any extension thereof, the same being delivered free of cost in storage tank or pipe line connected with the wells on said premises; or at the option of the first parties such deliveries may at any time or from time to time be commuted into cash at the market price for crude oil at the wells then prevailing in the field where the premises are situated.

8. The privilege hereby granted to the second party shall not include the exclusive right of possession or use of the surface or other portions of said lands, but only such as are necessary for the prosecution of the undertakings aforesaid. The second party shall at all times so conduct his operations as to interfere as little as practicable with the full use and enjoyment of the surface of said lands and other portions thereof not required for the purposes of this agree-
37 ment. Whenever requested by the first parties, the second party shall bury all oil, gas and water lines. At the termination of this agreement the second party will remove all refuse and obstructions of every kind from said premises, and restore said premises as nearly as practicable to their original conditions. No casings, however, shall be removed from any producing well, nor from any wells of water suitable for use which may be developed upon said premises, except such second or outer casing as may be removed without impairing the efficiency of the well.

9. No cessation of operations nor any delays in operation by the second party shall be excused unless the same shall be immediately reported to the first parties. All such notices shall be given to the agent of the first parties, and in each case of cessation or delays shall be accompanied with a full and particular statement of the causes and circumstances deemed to justify or excuse the same.

10. No assignment of this agreement, or any part thereof, nor any grant or transfer of rights arising under the same, may be made by the second party unless in writing, and with the written consent and approval of the first parties.

11. This agreement is made subject to all existing easements or rights of way in said lands, and subject to the laws of Wyoming authorizing future grants of easement or rights of way. The second party shall observe the laws of Wyoming and conform to the same in all his operations under this agreement.

12. In the event that the second party shall make default in the performance of the conditions of this agreement on his part, the first parties may at their option terminate the same forthwith. All notices which may be required to be given under this agreement to the second party may be ef-

fectually given by mail to the address set forth at the beginning of this agreement.

13. All controversies which may arise between the parties concerning the meaning or effect of this agreement, or the rights of the parties under the same, shall, at the request of either party, be submitted to arbitration, each party appointing an arbitrator and these two if necessary, an umpire. The award of the board of arbitrators shall be final and binding upon the parties. Either party will, on ten days' notice, appoint an arbitrator, and the arbitrators shall meet within ten days after appointment and complete the organization of the Board of Arbitration, and make their award in writing within thirty days after appointment. This provision shall not deprive the first parties of the remedy of injunction.

14. The parties of the first part will appoint an agent resident of Wyoming to whom the notices and communications required by this agreement to be made by the second party shall be given.

In Witness Whereof the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused these presents to be executed by its President and Secretary, the day and year first above written.

That the foregoing stipulation of facts was all of
38 the evidence given or offered on the trial of said cause.

Whereupon the plaintiffs moved for judgment in favor of the plaintiffs on the pleadings and proofs, which said motion was and is in words and figures as follows, to-wit:

Motion of Plaintiffs for Judgment on Pleadings and Proofs.

The plaintiffs upon the submission of the above-entitled cause to the Court moves the Court upon the pleadings and the evidence for judgment in favor of the plaintiffs and against the defendant for the amounts claimed in the petition with interest and costs.

Dated January 7, 1932.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

Whereupon defendant moved for judgment in favor of defendant, which said motion was and is in words and figures as follows, to-wit:

Motion for Judgment in Favor of Defendant.

Comes now Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the defendant above named, at the conclusion of all of the evidence introduced upon behalf of plaintiff and defendant, and moves the Court for judgment in favor of the said defendant and against the plaintiffs, dismissing plaintiffs' petition with costs to said defendant.

Dated this 7th day of January, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

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39 The Court then made and entered an order taking said case under advisement and allowing plaintiffs ten days for filing brief and allowing defendant ten days thereafter for filing defendant's brief and allowing plaintiffs five days thereafter for filing plaintiffs' reply brief, which said order was and is in words and figures as follows, to-wit:

Trial to Court and Case Taken Under Advisement.

At this day come the plaintiffs by N. E. Corthell, Esquire, their attorney, and the defendant, by John R. Wheeler, Esquire, Special Attorney for the United States Bureau of Internal Revenue, and Albert D. Walton, Esquire, United States Attorney for the District of Wyoming, also comes. And this case comes on now to be tried to the Court without a jury, pursuant to a written stipulation thereto heretofore filed herein.

Thereupon it is announced by counsel in open court that all evidence in this case will be in the form of written stipulation of facts herein filed.

Thereupon counsel for plaintiffs announces he desires to file motion for judgment for plaintiffs and permission therefor is granted by the Court, and thereupon plaintiffs file motion for judgment herein. Also, counsel for defendant state that they desire to file motion for judgment for defendant and, permission being granted by the Court, the defendant thereupon files motion for judgment herein.

This case is thereupon argued to the Court by the attorneys for the parties hereto and is by the Court taken under advisement.

It is ordered by the Court that plaintiffs be, and they are hereby, allowed ten days from and after this date within which to file and serve their brief; defendant is allowed ten days thereafter within which to file and serve his brief, and plaintiffs are allowed five days thereafter within which to file and serve reply brief.

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40 Be it further remembered that on the 7th day of April, A. D. 1932, the Court handed down a Judge's Memorandum holding and deciding as follows, to-wit: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases."

Be it further remembered that on the 7th day of April, A. D. 1932, an order was duly entered granting counsel thirty days from April 7, 1932, within which to submit judgment to the Court for approval, which said order was and is in words and figures as follows:

Order Allowing Time to Submit Judgment.

The Court having this day filed in Case No. 2062 Civil, Richard F. Cooper, Plaintiff, vs. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant, a memorandum opinion which also covers the trial of this case, it is now ordered by the Court that thirty days from and after this date be, and the same are hereby, allowed

within which the attorneys for the parties hereto may collaborate and submit form of judgment to be entered in this case.

Be it further remembered that on the 7th day of May, A. D. 1932, an order was duly entered enlarging the time to and including May 14, 1932, for counsel to prepare and submit judgment for the Court's approval, which said order was and is in words and figures as follows, to-wit:

Order Enlarging Time to Prepare and Enter Judgment.

The above-entitled matter coming on to be heard this day upon motion made in open court by Albert D. Walton, United States Attorney for the District of Wyoming, attorney for the defendant, for an order enlarging the time heretofore granted within which to prepare and enter judgment herein, and good cause being shown therefor:

It is hereby ordered that the time within which the
41 judgment in the above-entitled cause may be prepared and entered herein be, and the same is hereby, enlarged to and including the 14th day of May, A. D. 1932.

Dated this 7th day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that thereafter and on the 13th day of May, A. D. 1932, a judgment was entered in favor of the plaintiffs and against the defendant, which said judgment was and is in words and figures as follows, to-wit:

Judgment.

This cause having heretofore come on to be heard
42 before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury, and the plaintiffs having appeared by N. E. Corthell, their attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Attorney for the District of Wyoming, his attorneys; and the Court having taken the case under advise-

ment, and having considered the stipulation of facts and the other evidence, and the admissions made in open court, and having heard the argument of counsel, and being now fully advised:

The Court finds generally for the plaintiffs, Richard F. Cooper and Barbara V. Cooper, and against the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the cause of action set forth in the petition for the sum of Five Hundred Thirty and 75/100 Dollars ($530.75) with interest at the rate of 6% per annum from December 29, 1928.

It is therefore considered and adjudged by the Court that the plaintiffs, Richard F. Cooper and Barbara V. Cooper, do have and recover from the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the said sum of Five Hundred Thirty and 75/100 Dollars ($530.75), together with interest at the rate of 6% per annum from December 29, 1928, together with the costs of this action to be taxed.

To which finding and judgment the defendant excepted at the time; and the defendant is hereby allowed sixty days within which to file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collection of the income taxes for the recovery of which this action was brought.

43

Done in open court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that on the 9th day of July, A. D. 1932, a motion was filed on behalf of the defendant for an extension of time within which to prepare and file his bill of exceptions and submit the same to the Court for approval, which said motion supported by affidavit of Albert D. Walton, of counsel for defendant, was and is in words and figures as follows, to-wit:

Motion for Further Extension of Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

Comes now the defendant above named by Albert D. Walton, United States Attorney for the District of Wyoming, and moves the Court for an order further enlarging the time within which defendant may prepare and file bill of exceptions and present same to the Court for allowance to and including the 10th day of September, A. D. 1932.

This motion is based upon the affidavit of Albert D. Walton hereto attached and made a part hereof.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,

Attorney for Defendant.

Affidavit.

United States of America, District of Wyoming, State of Wyoming, County of Laramie—ss.

Albert D. Walton, being first duly sworn according to
44 law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is the attorney for the defendant in the above entitled cause; that a judgment was entered against the defendant in the above entitled cause on the 13th day of May, A. D. 1932, and that in and by said judgment as entered the defendant was given sixty days from and after date of entry within which to prepare and file a bill of exceptions and present the same to the Court for allowance; that immediately upon the entering of said judgment affiant notified the Attorney General of the United States that judgment had been entered against the defendant in said cause, and sent a copy of said judgment to the said Attorney General, and requested advice as to whether appeal would be taken; that up to the date hereof, to-wit, July 9, 1932, the Attorney General has not advised affiant as to whether an appeal is to be taken in said cause; that owing to the fact that affiant has been busily engaged in the work connected with the office of the United States Attorney for the District of Wyoming since May 13, 1932, he has

not had the opportunity to prepare said bill of exceptions, and owing to the business of said office now pending before said Court for disposition, affiant will be unable to prepare said bill of exceptions within the time allowed by the provisions of said judgment, but will be able to prepare, file, and present to the Court for allowance said bill of exceptions on or before September 10, 1932.

ALBERT D. WALTON.

Subscribed and sworn to before me this 9th day of July, A. D. 1932. (Seal) Clara H. Ahrens, Notary Public. My Commission expires February 5, 1934.

Be it further remembered that on the 9th day of July, A. D. 1932, an order was duly entered by the Court extending the time for defendant to prepare and file his bill of exceptions herein and present the same to the Court for approval, which said order was and is in words and figures as follows, to-wit:

Order Further Extending Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

The above entitled matter coming on to be heard
45 this day upon the motion of the defendant praying for an order further extending the time within which defendant may prepare and file his bill of exceptions herein and present same to the Court for allowance, and good cause being shown therefor:

It is hereby ordered that the time within which the defendant may prepare and file his bill of exceptions herein and present the same to the Court for allowance be, and the same hereby is enlarged and extended to and including the 10th day of September, A. D. 1932.

Dated this 9th day of July, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that on the 1st day of September, A. D. 1932, a motion was made and filed by the defendant in the above entitled cause praying that an order nunc pro tunc be entered overruling defendant's motion for judgment and

sustaining plaintiffs' motion for judgment, in accordance with the Judge's Memorandum handed down on the 7th day of April, A. D. 1932, which said motion was and is in words and figures as follows, to-wit:

Motion for Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiffs' Motion for Judgment.

Comes now Marshall S. Reynolds, Individually and as Collector of Internal Revenue, and moves the Court that an order nunc pro tunc be entered herein overruling defendant's motion for judgment made and filed on the 7th day of January, A. D. 1932, and sustaining plaintiffs' motion for
46 judgment made and filed on the 7th day of January, A. D. 1932, effective as of date May 13, A. D. 1932, in accordance with the Judge's Memorandum handed down and dated on the 7th day of April, A. D. 1932, for the reason and upon the ground that through inadvertence such an order has not been entered, nor did the judgment entered herein include the ruling upon said motions.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,

Attorney for Defendant.

Be it further remembered that on the 1st day of September, A. D. 1932, an order nunc pro tunc overruling the defendant's motion for judgment and sustaining plaintiffs' motion for judgment was duly entered herein, which said order nunc pro tunc was and is in words and figures as follows, to-wit:

Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiffs' Motion for Judgment.

The above entitled matter coming on to be heard this day upon the motion of the defendant above named praying that an order nunc pro tunc be entered overruling the defendant's motion for judgment and sustaining plaintiffs' motion for judgment, pursuant to the Judge's Memorandum handed down herein on the 7th day of April, A. D. 1932, and it appearing to the Court that in the said

Judge's Memorandum the Court held and decided: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be sub-
47 mitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases.".

And it further appearing to the Court that a judgment was entered in the above entitled case on the 13th day of May, A. D. 1932, in favor of the plaintiffs and against the defendant, but through inadvertence the said judgment did not contain a provision sustaining plaintiffs' motion for judgment and overruling the defendant's motion for judgment:

It is, therefore, ordered that the motion of the plaintiffs for judgment herein filed on the 7th day of January, A. D. 1932, be, and the same hereby is, sustained, to which said ruling the defendant duly excepts, and that the motion of the defendant for judgment in favor of the defendant filed on the 7th day of January, A. D. 1932, be, and the same hereby is, overruled and denied, to which said ruling the defendant duly excepts.

It is further ordered that this order be, and the same hereby is, effective from and after the 13th day of May, A. D. 1932, the date upon which judgment was entered in the above entitled cause.

Dated this 1st day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

It is hereby stipulated and agreed by and between
48 the parties hereto that the above and foregoing which is tendered by the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, as his bill of exceptions in the above-entitled cause, contains a full, true and correct statement of the evidence introduced in said cause, and a full, true, and correct statement of all of the proceedings in the trial and disposition of said cause, and the exceptions of the defendant had and taken in such pro-

ceedings, and that said tendered bill of exceptions may be approved, allowed, settled, and sealed as the bill of exceptions in this cause.

Dated this second day of September, A. D. 1932.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Order of Court Approving and Settling Bill of Exceptions.

Filed Sept. 2, 1932.

On this 2 day of September, A. D. 1932, and within
49 the time allowed by the order of this Court heretofore duly made and entered, the defendant Marshall S. Reynolds, Individually and as Collector of Internal Revenue, tendered his bill of exceptions herein, together with a stipulation of counsel that the same might be approved, allowed and settled as the bill of exceptions in this cause:

And the Court, having duly considered and examined said bill of exceptions, and it being found that the exceptions are therein truly alleged, the same is by the Court hereby allowed, settled and approved and said bill of exceptions is hereby signed and sealed by the Honorable T. Blake Kennedy, the Judge of said Court before whom said proceedings were had, and the same is ordered by the said Court to be filed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Judge before whom said proceedings were had this 2 day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Election as to Printing Transcript.

Filed Sept. 13, 1932.

Comes now the above named defendant and appellant
50 and hereby elects to have the printing of the transcript on appeal in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 12th day of September, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant-Appellant.

Stipulation for Transcript.

Filed Sept. 13, 1932.

It is hereby stipulated and agreed by and between
51 the parties to the above entitled cause that the following portion of the record shall be included in the transcript, to-wit:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of Errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulation as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

This stipulation.

Praecipe for transcript.

Clerk's certificate.

52 It is further stipulated that the above is without prejudice to either party to have any other portions of the record certified up if it should be necessary.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue.

Attorneys for Defendant.

Praecipe for Transcript.

Filed Sept. 13, 1932.

To the Clerk of said Court:

You are hereby requested and directed to prepare
53 and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulation as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

Stipulation as to transcript.

Praecipe for transcript.

Clerk's certificate.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,
EWING T. KERR,
Assistant United States Attorney
for the District of Wyoming,
JOHN R. WHEELER,
Special Attorney, Bureau of
Internal Revenue,
Attorneys for Defendant-
Appellant.

[Clerk's Certificate.]

United States of America, District of Wyoming—ss.

I, Charles J. Ohnhaus, Clerk of the District Court
54 of the United States within and for the District of Wyoming, do hereby certify the above and foregoing to be a true, correct and complete transcript and copy of the record and proceedings, and of all thereof, as called for by the praecipe for transcript filed herein, including the Judge's Memorandum, in a certain cause lately in said Court pending, between Richard F. Cooper and Barbara V. Cooper, Plaintiffs, and Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant, as full and complete as the same still remains on file and of record in my office at Cheyenne, Wyoming.

In witness whereof, I do hereunto sign my name and affix the seal of said Court at Cheyenne, in said District, this 15th day of September, A. D. 1932.

(Seal)

CHARLES J. OHNHAUS,
Clerk, United States District Court,
District of Wyoming.

Filed Sept. 21, 1932. Albert Trego, Clerk.

Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the January term, 1933, of said court, before the Honorable John H. Cotteral, circuit judge, the Honorable George T. McDermott, circuit judge, and the Honorable Tillman D. Johnson, district judge.

Be it remembered that heretofore, to wit: On the 21st day of September 1932 a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Marshall S. Reynolds, individually and as collector of internal revenue, was appellant and Richard F. Cooper and Barbara V. Cooper were appellees, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit under the supervision of its clerk, is in the words and figures following, to wit:

49 And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Appearances

For appellant

The clerk will enter my appearance as counsel for the appellant.

ALBERT D. WALTON,
Cheyenne, Wyo.,
U.S. Attorney, Dist. of Wyoming.
EWING T. KERR,
Cheyenne, Wyo.,
Asst. U.S. Attorney, Dist. of Wyoming.
JOHN R. WHEELER,
Seattle, Wash.,
Special Attorney, Bureau of Internal Revenue.

Filed Sept. 24, 1932. Albert Trego, clerk.

The clerk will enter my appearance as counsel for the appellant.

ELDON O. HANSON,
Bureau of Internal Revenue.

Filed Jan. 9, 1933. Albert Trego, clerk.

50 For appellee

The clerk will enter my appearance as counsel for the appellees.

N. E. CORTHELL,
Laramie, Wyo.

Filed Sept. 24, 1932. Albert Trego, clerk.

Order of Submission

No. 747, No. 748, No. 749

Second day, January term, Tuesday, January 10th, A.D. 1933

Before Honorable John H. Cotteral, Circuit Judge; Honorable George T. McDermott, Circuit Judge; and Honorable Tillman D. Johnson, District Judge.

These causes came on to be heard and, by agreement of counsel, were argued together, Eldon O. Hanson, Esquire, appearing for appellant, and N. E. Corthell, Esquire, appearing for appellees.

On motion, appellant was granted leave to file twenty printed copies of a reply brief herein instanter, which was accordingly done. Appellant was also granted leave to file twenty printed copies of a supplemental reply brief within five days, appellees to file twenty printed copies of a supplemental brief in reply thereto within fifteen days thereafter.

Thereupon these causes were submitted to the court.

51 United States Circuit Court of Appeals, Tenth Circuit

No. 747, January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER, APPELLEE

No. 748, January term, 1933

Appeal from the District Court of the United States from the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

BARBARA V. COOPER, APPELLEE

No. 749, January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER AND BARBARA V. COOPER, APPELLEES

[April 3, 1933]

Eldon O. Hanson, special attorney, Bureau of Internal Revenue (Albert D. Walton, U.S. attorney, C. M. Charest, General Counsel Bureau of Internal Revenue, John R. Wheeler, special attorney, Bureau of Internal Revenue, and Percia E. Miller, special attorney, were with him on the brief), for appellant.

N. E. Corthell (A. W. McCullough and M. E. Corthell were with him on the brief) for appellees.

Before COTTERAL and MCDERMOTT, Circuit Judges, and JOHNSON, District Judge.

MCDERMOTT, Circuit Judge, delivered the opinion of the court.

Appellees are the beneficiaries of a trust set up by the will of their father. A part of the trust estate consists of a royalty interest

under an oil and gas lease on lands in Wyoming, the lease running from the father, the owner of the oil reserves. Appellees returned for income-tax purposes the royalties received by them during the years 1923 to 1927, both inclusive. The trustees filed an information return only; the beneficiaries claimed the deduction for depletion, in an amount conceded to be reasonable, allowed by § 214 (a) 10, Rev. Act of 1921, and the corresponding sections in the Revenue Acts of 1924 and 1926. The claim was disallowed in its entirety, the Commissioner taking the position that since the legal title stood in the name of the trustees, with directions to convert into cash at their discretion, appellees had no present or reversionary interest in the mineral estate and were therefore not entitled to any depletion allowance. The tax was paid under compulsion and protest, and this action brought to recover it. A jury was waived; the facts stipulated; the plaintiffs recovered, Judge Kennedy filing a memorandum opinion in which he took the common-sense view that the trustees were but conduits through which the income passed in its journey from the oil fields of Wyoming to the appellees. Cooper *v.* Reynolds (D.C.Wyo.) 60 F. (2d) 650.

The question presented is whether a beneficial interest in oil in place will support a claim for depletion, or whether the taxpayer must be vested with a present or reversionary interest in the legal title. It is true that the legal title vested in the trustees; it is true they were directed, at a time to be selected by them, to convert the interest into cash. But it is likewise true that, during the years in question, appellees were entitled to the undiminished income from the trust, and upon conversion in their lifetime, to share in the distribution of the proceeds. No one else has any beneficial interest in the royalties producing the taxable income; no one else has or claims any depletion allowance for the capital investment returned by way of such royalties. The question therefore is, Is depletion confined to those who hold a technical legal title?

The answer is found in the decisions of the Supreme Court of the United States, and of other courts. Depletion allowances are not dependent upon tech'ical questions of title; they rest upon a broader base. If the taxpayer has an economic interest which is adversely affected by the production of oil, he may deduct depletion from the income received from that oil. Lynch *v.* Alworth-Stephens Co., 267 U.S. 364; Weiss *v.* Weiner, 279 U.S. 333; Palmer *v.* Bender, 287 U.S. 551. In the latter case, the taxpayer had assigned his lease, reserving only an over-riding royalty. In the cases at bar, appellees were entitled not only to the royalty, but to share in the proceeds of a sale if made in their lifetime. Equitable estates are not barred by either the statute or decisions. Commissioner *v.* Molter (C.C.A 10) 60 F. (2d) 498; Merle-Smith *v.* Commissioner (C.C.A 2) 42 F. (2d) 837, certiorari denied, 282 U.S. 897. In the latter case, the equitable interest was subject to extinction, but the taxpayer was held entitled to depletion while the interest lasted. To the same effect, see Kuhn *v.*

Commissioner, 24 B.T.A. 216; Alphin *v.* Commissioner, 21 B.T.A. 1101.

The decision of the Supreme Court of the United States in Anderson *v.* Wilson, — U.S. — (decided March 13, 1933), is cited by the appellant as opposed. There, as here, the legal title to the properties was in testamentary trustees; there, as here, the taxpayer was the beneficiary of the trust. The loss there was a capital loss arising from the sale of real estate by the trustees. It was held that the loss fell upon the trustees and not the beneficiary, and that the trustees were entitled to the deduction in their income-tax return.

There is language in the Anderson case which, taken out of its setting, supports the contention of appellant. The Supreme Court, however, sees no conflict between its opinion in the Anderson case and its opinion in Palmer *v.* Bender, handed down two months earlier, for the Palmer case is not cited, much less overruled. It is neither necessary nor proper for an inferior court to suggest a conflict where the Supreme Court has suggested none, nor, having suggested it, undertake to demonstrate its nonexistence. It may not be impertinent, however, in reply to appellant, to note that there is no irreconcilable inconsistency between the two decisions. One dealt with capital losses, and held that the loss follows the title; the other dealt with depletion of minerals by the production which gave rise to the income, and held that questions of title were not controlling. In one the trust was a taxpayer, entitled to claim the capital loss; in the other the trust made no return except for the information of the Commissioner.

It will be enough for us to decide which of the two cases controls the cases at bar. Fortunately that decision is not a difficult one. The Palmer case deals with the identical statute with which we are confronted. It deals with the depletion of oil reserves, as do our cases. In the Palmer case the taxpayer had no title either to the lease or the real estate; all he had was a contractual right to receive a part of the oil produced under a lease owned by another, from real estate owned by a third. In our cases the taxpayers have a testamentary right to receive a part of the oil produced under a lease owned by others—the trustees—plus a right to share in the proceeds of the royalty when and if sold. The legal questions presented are identical, except insofar as the appellees' case here is strengthened by their reversionary right. In the Palmer case the court declined to consider refinements of title. The court said:

"It has been elaborately argued at the bar and in the briefs whether under Louisiana law the two instruments are assignments or subleases. We do not think the distinction material. Nothing in § 214 (a) (10) indicates that its application is to be controlled or varied by any particular characterization by local law of the interests to which it is to be applied. * * * The formal attributes of those instruments or the descriptive terminology which may be applied to them in the local law are both irrelevant."

The court then considered whether the depletion statute was confined to any form of legal ownership, and gave its answer in these words:

"The allowance to the taxpayer is not restricted by the words of the statute to cases of any particular class or to any special form of legal interest in the oil well. * * * The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired by investment any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital. That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this court in Lynch *v.* Alworth-Stephens Co., 267 U.S. 364. * * * Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough, if by virtue of the leasing transaction he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. * * * Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships, and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case."

This considered language, dealing with the particular statute here involved, is broad and unmistakable. The decision itself allowed depletion to one who had much less economic interest in the oil reserves than the appellees here. In the cases at bar, unlike the Anderson case, it is not a question of which taxpayer gets the allowance; in our cases, the depletion actually suffered by the royalty interest must be allowed to appellees or no allowance therefor made. We cannot ignore the Palmer case because of a supposed conflict between it and a later case dealing with another statute.

The Palmer case and its progenitors do no more than apply, to a new situation, the accepted philosophy that taxation is an intensely practical matter, and questions must be determined according to the truth and substance of the transaction, and not by the form it took. Eisner *v.* Macomber, 252 U.S. 189; United States *v.* Phellis,

257 U.S. 156; Bowers *v.* Kerbaugh Emp. Co., 271 U.S. 170. The law recognizes equitable estates for the purpose of paying income taxes, Irwin *v.* Gavit, 268 U.S. 161; Anderson *v.* Wilson, supra; likewise it should and does recognize them for proper deductions from that income. The allowance claimed here was essentially just, for every barrel of oil produced lessened the eventual sale price of the property in which appellees may share; such production in fact depleted the reservoir of oil in which appellees had a substantial economic interest.

There is a subsidiary point, of minor importance, in No. 748. John Hartshorn Cooper, a brother of Barbara V. Cooper and one of the beneficiaries of the trust created by their father's will, died in 1921. Barbara inherited part of her brother's interest in the royalties in question. His estate was closed on September 13, 1923. The estate was, therefore, the taxpayer until September 13, 1923. and Barbara was the taxpayer after that date. Bankers' Trust Co. *v.* Bowers, (C.C.A. 2) 295 F. 89; Hoeper *v.* Tax Commission, 284 U.S. 206. The Commissioner apportioned the 1923 income between the two taxpayers according to the number of days included in each of the periods in question. The propriety of such method of apportionment if the Commissioner is unable to determine the actual income received by each of the taxpayers, is not questioned. On the other hand, the Commissioner should assess the income actually received by each of the taxpayers if it can be ascertained. Rules of thumb should only be resorted to in case of necessity, for the actual is always preferable to the theoretical. Doyle *v.* Mitchell Brothers Co., 247 U.S. 179, 187; Howbert *v.* Penrose (C.C.A. 10) 38 F. (2d) 577.

The point in disagreement is whether the record discloses that the Commissioner erred in resorting to an apportionment—that is, was the actual income of each taxpayer readily ascertainable? The record is not entirely satisfactory on the point but the petition alleges that the Commissioner added to appellee's taxes for the year 1923, the difference between the income actually received by her, and the amount which would have been received by her if the income for the entire year had been prorated according to the calendar. This allegation is expressly admitted by the answer. The stipulation of facts recites that for the year 1923 the Commissioner's determination rested in part upon the "difference between the actual gross receipts as returned by the plaintiff, and the gross receipts as determined by the Commissioner by apportionment." In addition to the pleadings and the stipulation of facts, it is a matter of common knowledge that a record is kept of oil runs, both by the producing companies and by the pipe line purchasers as the oil is marketed. From these records, a close approximation can be had as to the amount of production in any period of time. Furthermore, in all human probability, the trustees of this estate kept an accurate record of disbursements made by them to the estate of John

Hartshorn Cooper, as well as an accurate record of the disbursements made to Barbara V. Cooper. We therefore conclude that there is substantial evidence in the record to support the finding of the trial court on this question of fact.

Appellant filed a supplemental reply brief upon the question of interest, the contention being that because of section 319 of the Economy Act of June 30, 1932, the interest on this judgment should be reduced from 6 percent to 4 percent, at least after the effective date of the Economy Act. Huwe *v.* Ohmer Fare Register Company (C.C.A. 6) 61 F. (2d) 721; Caraleigh Phosphate & Fertilizer Works *v.* United States (Ct.Cl.) 1 F. Supp. 854. The point passes out of the case by virtue of section 2 of the First Deficiency Act of January 30, 1933. Title 2, § 2 of that act provides that "section 319 of the act of June 30, 1932, shall not apply to any judgment rendered against the United States prior to July 1, 1932."

The judgments are affirmed.

52 *Judgment*

Thirty-seventh day, January term, Monday, April 3rd, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, circuit judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Motion to Stay Mandate

Comes now Marshall S. Reynolds, individually and as collector of internal revenue, appellant in the above-entitled cause, and moves for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for a period of thirty (30) days, pending an application to the Supreme Court of the United States for a writ of certiorari.

Dated this 2nd day of May, A.D. 1933.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,
53 EWING TO KERR,
Asst. United States Attorney for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue.
Attorneys for Appellant.

Filed May 3, 1933. Albert Trego, clerk.

Order

Thursday, May 4th, A.D. 1933

Before Honorable Robert E. Lewis, senior circuit judge, at Denver, Colorado, the following proceedings were had:

This cause came on to be heard on the motion of appellant for a stay of the mandate herein.

On consideration whereof, and for good cause shown, it is now here ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

54 *Motion to stay mandate*

Comes now Marshall S. Reynolds, individually and as collector of internal revenue, appellant in the above-entitled cause, and moves the court for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for an additional period of thirty days, pending an application to the Supreme Court of the United States for a writ of certiorari. This motion is based upon the affidavit of Albert D. Walton, which is hereto attached and made a part hereof.

Dated this 2nd day of June, A.D. 1933.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,
EWING T. KERR,
Asst. United States Attorney for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Appellant.

Filed June 3, 1933. Albert Trego, clerk.

55 *Order*

No. 747. No. 748, No. 749

Twentieth Day, April term, Saturday, June 3rd, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, circuit judges.

These causes came on to be heard on the motion of appellant for a further stay of the mandate herein and was submitted to the court.

On consideration whereof it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day; and that if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supeme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

56 *Clerk's Certificate*

United States Circuit Court of Appeals, Tenth Circuit

I, Albert Trego, clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Wyoming, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals wherein Marshal S. Reynolds, individually and as collector of internal revenue, was appellant, and Richard F. Cooper and Barbara V. Cooper were appellees, No. 749, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the city of Denver, Colorado, this 20th day of June, A.D. 1933.

[SEAL]

ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for argument immediately following no. 225.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue, petitioner

v.

RICHARD F. COOPER

No. —

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue, petitioner

v.

BARBARA V. COOPER

No. —

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue, petitioner

v.

RICHARD F. COOPER AND BARBARA V. COOPER

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of Marshall S. Reynolds, Collector of Internal Revenue, prays

that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Tenth Circuit in the above-entitled causes entered April 3, 1933, affirming judgments of the District Court for the District of Wyoming.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 24–29) is reported in 60 F. (2d) 650. The opinion of the Circuit Court of Appeals is reported in 64 F. (2d) 644.

JURISDICTION

The judgments sought to be reviewed were entered April 3, 1933. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether beneficiaries of a trust are entitled to a deduction from trust income for depletion of a mineral property constituting the corpus of the trust.

STATEMENT

These three cases were tried together by the District Court without a jury, pursuant to a stipulation (R. 23–24).[1] The facts were stipulated (R. 36–55), and may be summarized as follows:

The respondents are the beneficiaries of a trust created by the will of their father, A. F. T. Cooper,

[1] All references will be made to the record in the *Richard F. Cooper* case.

who died December 8, 1918 (R. 37). Under this will, together with a codicil (R. 48–50), the residuary estate was left to trustees. The trustees were directed by clause 14 of the will (R. 44–45), as amended by clause 2 of the codicil (R. 49), to convert the property into money at such time and in such manner as they should think fit, with full power to postpone the sale and to manage the property in the meantime. After the payment of 21,000 pounds, as directed by the will, the trustees were to pay one-half of the balance of the residue to Richard Francis Cooper absolutely, one-fourth to John Hartshorn Cooper absolutely, and one-fourth to Barbara Violet Cooper.

Part of the residuary estate consisted of certain oil and gas land in Wyoming, which the testator had leased to the Ohio Oil Company on October 9, 1917, for a period of twenty years, with the privilege of an extension for a further period of twenty years. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. (R. 37, 50–55.)

Prior to 1923, the trustees had paid the testator's debts and the legacies provided by the will, and had carried out the direction with respect to the first 21,000 pounds of the residue, so that during 1923 and the subsequent years here involved the ultimate residuary clause of the will and codicil was operative. Prior to September 13, 1923, Richard F. Cooper received one-half of the distributions made by the trustees, the estate of John H. Cooper

received one-fourth and Barbara V. Cooper received one-fourth. Of distributions made after September 23, 1923, through 1927, Richard F. Cooper received one-half, plus one-eighth (as devisee under the will of John H. Cooper), and Barbara V. Cooper received the remaining three-eighths. (R. 37–38.)

In their information returns of trust income for 1923 to 1927, inclusive, the trustees claimed deductions for depletion and the beneficiaries in reporting their distributive shares of the trust income in their individual returns took this depletion into account (R. 38–39).

The Commissioner determined that the beneficiaries were not entitled to have their distributive shares of income reduced by a deduction for depletion and determined deficiencies accordingly (R. 39). After payment of the taxes thus found due, claims for refund were filed, and more than six months thereafter these suits to recover the additional taxes were commenced by the beneficiaries. The District Court gave judgment for the plaintiffs and the Circuit Court of Appeals affirmed this decision.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the respondents were entitled to a deduction for depletion of the corpus of the

[2] The amount of depletion allowable, if any is allowable, is not in dispute (R. 39).

trust from which they received distributions of income.

2. In failing to hold that there is no statutory authority in the Revenue Acts of 1921, 1924, and 1926 for the allowance of a deduction for depletion from trust income received by beneficiaries of a trust.

REASONS FOR GRANTING THE WRITS

The question presented by these cases is closely related to that involved in *Commissioner of Internal Revenue* v. *Otto H. Falk, et al., Executors of the estate of Charles F. Pfister, deceased, etc.*, No. —, October Term, 1933, in which a petition for a writ of certiorari is being filed. The reasons relied upon as justifying the issuance of the writ are presented in that petition, to which this Court is respectfully referred.

Wherefore, it is submitted that this petition for writs of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JULY 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 227

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue, petitioner

v.

RICHARD F. COOPER

No. 228

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue, petitioner

v.

BARBARA V. COOPER

No. 229

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue, petitioner

v.

RICHARD F. COOPER AND BARBARA V. COOPER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the District of Wyoming (R. 24–29) is reported in 60 F. (2d) 650.

19330—33

The opinion of the Circuit Court of Appeals (R. 66–71) is reported in 64 F. (2d) 644.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 3, 1933. (R. 71.) The petition for writs of certiorari was filed July 1, 1933, and was granted October 9, 1933. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether beneficiaries of a trust receiving distributions of income are entitled to deductions for depletion of the mineral property constituting a part of the corpus of the trust.

STATUTES INVOLVED

The statutes involved are set forth in the appendix to the Government's brief in *Helvering* v. *Falk*, No. 225, October Term, 1933.

STATEMENT

These three cases were tried together by the District Court without a jury pursuant to a stipulation. (R. 23–24.)[1] The facts as stipulated are in substance as follows:

The respondents are the beneficiaries of a trust created by the will of their father, A. F. T. Cooper, who died December 8, 1918. (R. 37.) Under this will, together with a codicil, the residuary estate was left to trustees. The trustees were directed by clause 14 of the will (R. 44–45) as amended by clause 2 of

[1] All references will be made to the record in the *Richard F. Cooper* case.

the codicil (R. 49) to convert the property into money at such time and in such manner as they should think fit, with full power to postpone the sale and to manage the property in the meantime. After the payment of £1,000 pounds, as directed by the will, as amended by the codicil, the trustees were to pay one half of the balance of the residue to Richard Francis Cooper absolutely, one fourth to John Hartshorn Cooper absolutely, and one fourth to Barbara Violet Cooper. (R. 44–45, 49.)

Part of the residuary estate consisted of certain oil and gas land in Wyoming, which the testator had leased to the Ohio Oil Company on October 9, 1917, for a period of twenty years, with the privilege of an extension for a further period of twenty years. The lease provided for royalty payments to the lessor, beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter (R. 37, 50–55).

The codicil contained the following provisions relative to distributions by the trustees (R. 48–49):

> 1. I hereby declare that my trustees shall have full power of postponing for any length of time as in their uncontrolled discretion they may think fit the realization of the oil rights under my ranch in Wyoming U.S.A., without being liable for any loss arising therefrom and of deciding what proportion of the annual receipts therefrom shall be treated as capital and what proportion as income and their decision shall be considered for all purposes as final.

Prior to 1923, the trustees had paid the testator's debts and the legacies provided by the will, and had carried out the direction with respect to the first 21,000 pounds of the residue, so that during 1923 and the subsequent years here involved the ultimate residuary clause of the will and codicil was operative. Prior to September 13, 1923, Richard F. Cooper received one-half of the distributions made by the trustees, the estate of John H. Cooper received one-fourth, and Barbara V. Cooper received one-fourth. Of distributions made after September 23, 1923, through 1927, Richard F. Cooper received one-half, plus one-eighth (as devisee under the will of John H. Cooper), and Barbara V. Cooper received the remaining three-eighths. (R. 37–38.)

In their information returns of trust income for 1923 to 1927, inclusive, the trustees claimed deductions for depletion and the beneficiaries in reporting their distributive shares of the trust income in their individual returns took this depletion into account.[2] (R. 38–39.)

The Commissioner of Internal Revenue determined that the beneficiaries were not entitled to have their distributive shares of income reduced by a deduction for depletion and determined deficiencies accordingly. (R. 39.) After payment of the taxes thus found due, claims for refund were filed, and more than six months thereafter these suits to recover the additional taxes were commenced by the beneficiaries. The District

[2] The amount of depletion allowable, if any is allowable, is not in dispute. (R. 39.)

Court gave judgment for the plaintiffs and the Circuit Court of Appeals affirmed this decision.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the respondents were entitled to a deduction for depletion of the corpus of the trust from which they received distributions of income.

2. In failing to hold that there is no statutory authority in the Revenue Acts of 1921, 1924, and 1926 for the allowance of a deduction for depletion from trust income received by beneficiaries of a trust.

ARGUMENT

These cases present the question whether beneficiaries of a trust receiving distributions of trust income are entitled, under the Revenue Acts of 1921, 1924 and 1926, to deductions for depletion of the property owned by the trust. The question is identical with that raised in *Helvering* v. *Falk*, No. 225, October Term, 1933, and the argument made in the Government's brief in that case is likewise applicable here.

The only difference in the facts is that in the *Falk* case property remaining in the trust at its termination reverted to the settlor, whereas in the instant cases the trustees were obliged to convert the estate into cash and to distribute the proceeds to the beneficiaries receiving the income. But the very fact of conversion prevents the beneficiaries from having an interest in the real estate held in trust. *Anderson* v. *Wilson*, 289 U.S. 20. There is therefore substantially no differ-

ence between the position of the beneficiaries in this case and in the *Falk* case.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

NOVEMBER 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

Brief for the Respondents in Opposition

IN THE
Supreme Court of the United States
October Term, 1933

No. 227

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

vs.

RICHARD F. COOPER.

No. 228

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

vs.

BARBARA V. COOPER.

No. 229

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

vs.

RICHARD F. COOPER AND BARBARA V. COOPER.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

N. E. Chatfield,
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Attorneys for Respondents,
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Brief for the Respondents in Opposition

IN THE

Supreme Court of the United States

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ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE
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October Term, 1933

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MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

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MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, *Petitioner,*

vs.

RICHARD F. COOPER AND BARBARA V. COOPER.

Brief for Respondents in Opposition

STATEMENT

While the petitioner in these cases submits no separate brief in support of the petitions for certiorari, yet reference is made in the petition (p. 5) to the pending case of Burnett vs. Falk (No. 225), in which a supporting brief has been filed and in which authorities are reviewed.

QUESTION INVOLVED

The sole question raised in these cases is whether a beneficiary who receives the gross proceeds of oil royalties, without diminution except for administrative expense, is entitled to the benefit of depletion deduction in determining his net income and the resulting tax.

No question of allocating the tax or the depletion deduction between the respondent and the trustees is presented. The respondent is a beneficiary as to both income and capital. He is the taxpayer; the trustees are not. The question is whether depletion is allowable, at all, to anybody.

The trustees, in conformity with the provision of the trust, made information returns in which they separated the gross receipts into capital and income, by deducting the statutory depletion. The beneficiary returned the income but not the capital items. The commissioner added to the net income the capital items so deducted. The tax results from such action.

ARGUMENT

Petitioner's contention is plainly implicit, if not wholly explicit, that the interest of the beneficiary of a trust, however comprehensive and complete, is not such a property right in the subject of the trust as to justify a depletion allowance under the Statute. This contention, as applied to these cases, apparently means that the statutory depletion is only applicable to legal, as distinguished from equitable, estates.

None of the cases cited lends even color to this contention. They are cases involving capital losses or depreciation, not depletion. All of them, whether involving capital losses or depreciation, turn upon the distinction between the interest of a life tenant and that of a remainderman or reversioner and base the determination upon the fact that it is the latter interest, and not the former, which sustains the loss or the depreciation. All of them carry the plain implication that the taxpayer, upon whose interest the loss or depreciation falls, is the one who is entitled to the allowance.

There is the further obvious distinction between capital losses and depreciation, on the one hand, and depletion, on the other, that in the latter case the corpus or capital is represented and consumed pro tanto in the actual receipts, whereas, in the former case, the loss or depreciation has no direct or necessary connection with the receipts, a distinction which was pointed out, although not elaborated, in Merle-Smith vs. Commissioner, 42 Fed. (2d) 837, 841.

On the question actually presented by the record in these cases there is believed to be no conflict or uncertainty in the Court decisions. This Court, in cases directly involving the right of the taxpayer to claim depletion allowances, has indicated clearly the scope of the several statutes involved. In Lynch vs. Alworth-Stephens Co., 267 U. S. 364, 370, it was recognized that a mine lessee who had sublet the mine has such an interest in the property from which he derives income that he is entitled to the depletion allowance. The Court said:

> "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone whose property right and interest therein have been depleted by the extraction and disposition of the product thereof which has been mined and sold during the year for which the return and computation are made";

and, reaffirming the doctrine, in Palmer vs. Bender, 287 U. S. 551, the Court again said:

> "The language of the statute is broad enough to provide at least for every case in which the taxpayer has acquired, by investment, any interest in the oil in place and secures, by any form of legal relationship, income derived from the extraction of the oil to which he must look for the return of his capital."

Speaking especially of the effect of a trust on the right of the beneficiary of a charitable trust to claim the benefit of a tax exemption, the Court, in Lederer vs. Stockton, 260 U. S. 1, 8, said:

> "To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income [to avoid the exemption], would be to defeat the beneficient purpose of Congress."

Further, in Lynch vs. Alworth-Stephens Co., supra, considering especially what kind of interest of the taxpayer constitutes a sufficient foundation for the claim of depletion allowance, the Court said:

> "There is nothing to suggest that the word 'property' is used in any restricted sense."

In Bryan vs. Kennett, 113 U. S. 179, the Court, speaking of the property relation between a trustee and beneficiaries, said:

> "The term 'property', as applied to lands, comprehends every species of title, inchoate or complete",

and quoted, with approval, from a previous decision that:

> "By the term 'property', applied to lands, all titles are embraced, legal or equitable, perfect or imperfect."

We do not think that the question now sought to be raised in these cases, whether the interest of a beneficiary under a trust constitutes "property", is an open one in this Court, or that the proper interpretation of the depletion statutes here involved is one which this Court has not heretofore fully considered and settled.

The Courts of at least three of the circuits have specifically upheld the right of the beneficiary, entitled, as are the respondents, to participate in both corpus and income, to take deduction allowance for depletion.

Merle-Smith vs. Commissioner, 42 Fed. (2d) 837 (C. C. A. 2; Certiorari denied 282 U. S. 897)

Falk vs. Commissioner, 64 Fed. (2d) 171 (C. C. A. 7)

Cooper vs. Reynolds, 60 Fed. (2d) 650

Reynolds vs. Cooper, 64 Fed. (2d) 644 (C. C. A. 10)

Commissioner vs. Molter, 60 Fed. (2d) 498, 499 (C. C. A. 10)

The Board of Tax Appeals, in recent cases, follows the same rule.

Alphin vs. Commissioner, 21 B. T. A. 1101

Kuhn vs. Commissioner, 24 B. T. A. 216

The Bureau of Internal Revenue seems now to recognize the same rule.

C. B. X-2, 353 (G. C. M. 9804)

C. B. XI-1, 169 (G. C. M. 10,273).

Prior to the Revenue Act of 1928, (Sec. 23 (1), 45 Stat. 800), the Bureau of Internal Revenue, whether properly or improperly, apparently treated depletion as a deduction wholly concerning the *capital* owner or beneficiary. The Act of 1928 definitely allocated depletion to the *income* owner or beneficiary, evidently under the doctrine governing "opened" mines. Where, as in the present cases, the beneficial ownership of both capital and income is united, no question of allocation can arise either under the old or the new enactments.

In view of the unanimity of the Courts on the substantive question here actually involved and the number, variety and cogency of application made by them of the principle declared and thus established, it is submitted that these cases do not call for further review by this Court.

Respectfully submitted,

N. E. CORTHELL,

A. W. McCOLLOUGH,

Attorneys for Respondents.

IN THE

Supreme Court of the United States

October Term, 1933

No. 227

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, PETITIONER

v.

RICHARD F. COOPER

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 227

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, PETITIONER

v.

RICHARD F. COOPER

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RICHARD F. COOPER and BARBARA V. COOPER

Brief of Respondents

QUESTION PRESENTED

A more accurate statement of the abstract question presented in these cases would be: whether the provisions of the Revenue Act of 1921, Section 214 (a), that "in computing net income there shall be allowed as deductions: *** (10) in the case of mines, oil and gas wells * * * * a reasonable allowance for depletion", (42 Stat. 239—241), and the corresponding provisions of the Revenue Acts of 1924 and 1926,

have any applicability at all in the case of oil royalties received by trustees under a testamentary trust and paid over to those who have the full and unrestricted beneficial interests in the entire estate.

SUPPLEMENTAL STATEMENT

In view of the fact that the petitioner's brief contains no argument except by reference to the brief in the case of Helvering v. Falk, No. 225, and that stress appears to be laid, in the latter brief, upon the distinction between the interest of the trustees and those of the beneficiaries, it is deemed proper to supplement the petitioner's statement on this point, showing more fully the nature of the interests vested in the trustees and the beneficiaries and what was actually done under the Cooper will.

The will of A. F. T. Cooper, by which the trust involved in these cases was created, is set forth in the Transcript at pages 41—48, with a codicil at pages 48—50.

The will, in clause 1, revokes former wills and, in clauses 2 and 22, appoints executors and trustees who, by clause 14, were given the residue of the estate with power to sell, call in, collect and convert the same into money.

The object and purpose of this power are implicit in numerous provisions for specific or preferred legacies or bequests (Clauses 3, 4, 5, 6, 7, 12, 13), minor annuities (8, 9, 10), preferred trust funds (6, 11), including a preference of £21,000 in the first part of Clause 2 of the codicil, a special trust for the testator's daughter (15, 16, 18), sundry charges (19, 20), a contingency eliminated at the testator's death (17), regulating investments (21) and explanatory of gifts (23).

Before the taxable periods here involved (1923—1926), all of these dispositions had been completed (R. 37) except the ultimate, residuary disposition provided in Clause 14 of the will, as modified by Clause 2 of the codicil (R. 44—45, 49), under which the trustees held the residue:

> "Upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely and as to one-

fourth part or share for my said son John Hartshorn Cooper absolutely and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper", (upon the special trust as to this one-fourth part declared in clause 15 of the will).

During the taxable periods involved the trustees, therefore, received and distributed the receipts of oil royalties under the existing lease to the three beneficiaries, as above indicated (R. 38).

For each of the taxable years the trustees made fiduciary returns. A typical form of the return, extracted from the Stipulation (R. 38) and rearranged, for convenience of reference, according to the prescribed forms of return in use, is that for 1927, as follows:

TRUSTEES' FIDUCIARY RETURN (R. 38)
INCOME—1927

Interest on Bank Deposits, etc.		$ 380.35
Rents and Royalties (Oil and Gas):		
Amount received	$99,121.65	
Depletion	39,789.46	
Net Profit		59,332.19
Total Income		$59,712.54

DEDUCTIONS

Taxes paid	$2,281.19	
Other Deductions — Attorney's fees and expenses	3,013.81	5,295.00
Net Income		$54,417.54

BENEFICIARIES' SHARES OF INCOME AND CREDITS

		(Distributions)
	Percentage	Dividends
R. F. Cooper	62.5	$34,010.96
B. V. Cooper	37.5	20,406.58
	100.0	$54,417.54

A like typical form for the same year of the Richard F. Cooper return, upon which the tax was paid, is as follows:

TAXPAYER'S RETURN. (R. 37)
R. F. COOPER INCOME—1927

Income from fiduciaries (as shown in Fiduciary return) $34,010.96

The Commissioner, in assessing the additional tax of Richard F. Cooper, added to his return 62.5% of the depletion deducted in the return of the trustees, viz:

62.5% of $39,789=$24,868.38 (R. 39, par. 6, R. 40, par 7).

The computation made upon this basis resulted in an additional tax of $5,769.82, which was assessed and paid, with penalty and interest, bringing the payment up to $6,465.27. (R. 39, 40).

It is the latter amount, with interest, which the taxpayer seeks to recover on account of the assessment of 1927. The same question arises and is presented in a similar manner with respect to the taxes for each of the other years.[1]

SUMMARY OF ARGUMENT

1. The ultimate question in these cases is whether any depletion shall be allowed to anybody. There is no other interest except the interest of the respondents which would be benefited or to which it could be allocated.

[1]The above typical returns are selected and arranged for convenience of future reference. As no question is raised in this Court except the question arising on this return and common to all the other returns, the case will for simplicity be referred to as the case of Richard F. Cooper.

2. The question is not one of the power of Congress, but whether it was the intent of Congress to tax gross income as distinguished from net income.

3. A conspectus of the relevant statutory provisions for depletion discloses an unmistakable intent to allow depletion in all cases in computing net income to be taxed.

4. Congress since the 16th Amendment has never provided for the taxation of gross income—all the Revenue Acts impose the tax on net income.

5. The express authority for depletion deduction in Sec. 214 of the Revenue Act of 1921 applies to all incomes and is impersonal; beneficiaries are taxable only as individuals.

6. The returns in the present case were made upon the the forms and in accordance with the method prescribed and used in the administration of the Revenue Acts. There was no authority or justification for the action of the Commissioner in surcharging the depletion eliminated in the returns.

7. Distributive shares of beneficiaries where referred to in the Revenue Acts mean distributive income—not capital. The use of the term in the petitioner's brief is confusing and misleading.

8. Under the conditions established by the will of the testator and the dispositions accomplished prior to the taxable periods here involved, the only possible allocation of trust funds, whether income or capital, was to the respondents, and the only possible allocation of depletion, therefore, is to them.

9. The only authorities pertinent to depletion deduction in cases of the class to which these cases belong sustain the respondents' claim.

10. There are essential differences between deductions for depletion, which are inseparable from the production of the income taxed, and deductions of other items enumer-

ated in the Revenue Acts, which may be and often are dissociated from income.

11. Cases in this Court and in the Courts of the several Circuits in which depletion deductions were involved concur in supporting the respondents' claims.

12. In allowing depletion deductions "according to the particular conditions in each case", Congress must have been aware of the common occurrence of oil production operations involving trusts and must have legislated with that condition in mind.

13. Where the interests of beneficiaries arise under active trusts and are, therefore, equitable in their nature, they are still recognized as "property" and have most of the usual incidents of property.

14. What is income in the hands of trustees remains income when transferred to beneficiaries of a trust. Its character does not change.

15. There appears to be no authority in the Statutes or under the decisions of Courts for denial of depletion in the instant cases.

16. While the trustees under the Cooper will were given power of conversion of the properties of the estate, the purpose was manifestly to raise the needful funds to satisfy the testamentary dispositions prior to the residuary devise under which the properties came into their hands. This purpose was accomplished and during the taxable periods the trust had become inactive and was executed by force of the Statute of Uses.

ARGUMENT

1 Question is one of any depletion allowance at all.

The question presented by the petitioner for review in these cases and others assigned for argument in connection with them is stated, rather incompletely we think, in the following form:

"Whether beneficiaries of a trust receiving distribution of income are entitled to deductions for depletion of the mineral property constituting a part of the corpus of the trust." (Petitioner's briefs 2)

In the early part of this brief we have restated the question as follows:

"Whether the provisions of the Revenue Act of 1921, Section 214 (a), that 'in computing net income there shall be allowed as deductions: * * (10) in the case of mines, oil and gas wells * * * a reasonable allowance for depletion', (42 Stat. 239—241), and the corresponding provisions of the Revenue Acts of 1924 and 1926, have any applicability at all in the case of oil royalties received by trustees under a testamentary trust and paid over to those who have the full and unrestricted beneficial interests in the entire estate."

As applied to the Cooper cases we think this statement of the question, while still rather narrow, is a more exact statement of the question presented by the record.

It is true, no doubt, that the question is peculiarly one of statutory construction. The particular Sections of the statute relied upon, however, not only have an environment in the cognate statutory provisions but they have a background in the history of Federal Revenue Legislation which cannot be ignored in any attempt at a comprehensive and just interpretation of these provisions.

After the decision of the case of Pollock v. Farmers Loan and Trust Company, 157 U. S. 429 in 1895 it was accepted as an established constitutional principle that Congress could not impose an income (direct) tax without apportionment. Excises on the privilege of doing corporate business, imposed after that decision, were carefully distinguished by this court as such in contradistinction to income taxes, qua *income* taxes, and several of the decisions cited in the petitioner's brief were concerned with cases of that character and can hardly be considered direct authority on the subject of income taxation. The Sixteenth Amend-

ment removed the restriction as to "taxes on income" but left the constitutional authority, otherwise, where it was before.

2 Question not of power, but of intent, of Congress.

As we understand the petitioner's argument, it involves two propositions, (1) that Congress has power to tax "gross income" and (2) that the Revenue Acts of 1921, 1924 and 1926 do not expressly (specifically) authorize beneficiaries of a trust, as such, to deduct depletion from oil royalty income. For reasons which will sufficiently appear in the argument, we do not deem it necessary or pertinent to discuss the first of these propositions.

It is noteworthy that in the legislation subsequent to the Sixteenth Amendment, imposing income taxes, there has been no attempt to impose taxes on *gross* income. All of the subsequent Acts, we believe, have clearly expressed the purpose to lay the tax on *net* income. The definitions of gross and net income and the prescribed methods of determining them have been substantially uniform with the Revenue Acts of 1921, 1924 and 1926 here involved.

It is also to be noted that these definitions and methods are impersonal, being concerned with the subject-matter rather than with the taxpayer; with things rather than with persons. Wherever in the Statutes the personal situation or relations of the taxpayer call for specific provisions, these are to be found either in separate regulations or in modifications of other general provisions. From the very nature of tax legislation the taxes and the subjects of taxation must be described in general and abstract terms. It would be physically impossible for Congress to frame a legislative Act dealing with property, incomes, transactions or methods of administration otherwise than in this manner. The utmost that has been attempted is to reduce these elements to a few comprehensive classifications.

3 Conspectus of relevant statutory provisions.

A brief conspectus of the relevant statutes under which the question in these cases arises will serve to illustrate the argument.

Section 210 of the Revenue Act of 1921 (42 Stat. 227) provides that "there shall be levied * * * upon the *net income* of every individual" (a normal tax); and Sec. 211, in similar language, imposes a surtax.

A "taxpayer" is defined in Sec. 2 (1) (10) as including "any person, trust or estate subject to tax" (42 Stat. 227).

Sec. 212 (a) provides that "in case of an individual the term 'net income' means the gross income as defined in Sec. 213, less the deductions allowed by Sec. 214". (42 Stat. 237).

Sec. 213 provides that "the term 'gross income' (a) includes * * * gains, profits and income derived from any source whatever". (42 Stat. 237—8).

Sec. 214 (a) provides that "in computing net income there shall be allowed as deductions: * * *
(10) In the case of mines, oil and gas wells * * * a reasonable allowance for depletion." (42 Stat. 239—241).

Sec. 219 (a) provides that "the tax imposed by Sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust including * * *
(4) Income which is to be distributed to the beneficiaries periodically. * * *

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Sec. 212 (except that in lieu of the deduction authorized by paragraph (11) of subdivision (a) of Sec. 214) there shall be allowed (charitable contributions, *without limitation*, etc.). * * In cases in which there is any income of the class described in paragraph (4), of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary * * *. (d) In cases under paragraph (4) of subdivision (a) * * * the tax shall not be paid by the fiduciary, but there shall be included in computing the net income

of each beneficiary that part of the income of the estate or trust * * * which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary". (42 Stat. 246—7).

It is a fair synopsis of these provisions that every tax is laid upon net income; that net income means gross income less prescribed deductions; that one of these deductions is the depletion sustained in the production of oil; that the net income of a trust is to be ascertained in the same manner as that of an individual; and that distributable income of the trust is to be included in computing the net income of the beneficiary and the tax paid by him as an individual.

4 Gross income must be reduced to net before tax.

The entire argument of the petitioner appears to be built up on the sense in which the term "income" is used in Sec. 219 (b) and (d) supra, requiring the fiduciary to include in his return a statement of the "income" of the trust which is distributable to each beneficiary, and providing that that part of the "income" distributable shall be included in computing the net "income" of such beneficiary.

There would seem to be no reason, from the language of the Statutes, for giving the word, in this connection, any other meaning than that which is used in expressly defining the term "gross income" in Sec. 213 supra, where it is provided that:

> "The term gross income (a) includes * * * income derived from any source whatever".

We understand that this is the meaning given to the term in the petitioner's argument. Under any interpretation that has been suggested, whatever is included in the term "gross income", as thus defined, would seem to be subject to the deductions expressly required to be made in arriving at the net income; and "income from any source whatever" undoubtedly includes income received by a beneficiary under a trust. In every case gross income before it is subjected to the tax must be reduced to net income. A beneficiary is

not less an individual and, a taxpayer because he happens to receive his income through a trust. Moreover, there is in such case, as it were, a double sanction for the deduction claimed, first, by the trust and, second, by the beneficiary, both of whom are classified as taxpayers. Of course, we do not mean by this a second deduction of the same allowance, but that alternative methods of allowing the deduction are possible under the Statute.

The Statute does not seem to admit of any other practical interpretation of the provision of Sec. 219 (d) that:

> "There shall be included *in computing the net income* of each beneficiary that part of the income of the estate or trust * * * which * * * is distributable to each beneficiary."

The net income of the beneficiary is still "to be computed". But this Section furnishes in itself no method for making the computation. It is only by reference to the provisions of Sec. 214 that any method can anywhere be found for making the computation. The latter Section is explicit in allowing the depletion deduction.

We think the provisions of the statute invoked by the Government, even when considered without reference to other provisions or to the inherent nature of the subject-matter, thus refute the Government's contention. But more especially when considered in the light of the frame-work, purpose and spirit of the Revenue Acts and the methods prescribed for applying them to individual cases and for ascertaining the specific subject of the tax, the error involved in the Government's contention appears still more emphatically.

5 Express authority for depletion deduction applies to all taxpayers.

The key to the petitioner's argument for disallowance of the depletion deduction is contained in the second Specification of Error at page 5 of the brief in No. 225, that there is no (express) statutory authority in the Revenue Acts for

the allowance of such deduction "to beneficiaries of a trust who receive distributions of trust income but have no remainder interest in the corpus of the trust"; and this is reiterated at pages 6, 11 and 13 of the brief.

This argument implies that such a beneficiary is to be distinguished from the "individual" taxpayer mentioned in Secs. 210, 211 and 212 supra. But these Sections contained the only authority for imposing a tax at all. It is true that Sec. 219 provides that as to certain income the tax shall be paid by the beneficiary, but unless this has reference to the Sections above cited, imposing and defining the tax, there is nowhere any declaration of what tax is to be paid. We think that a beneficiary is necessarily subsumed under the provisions of Secs. 210, 211 and 212; and, in turn, these Sections make clear that the deductions provided in Sec. 214, supra, apply. In other words, the beneficiary is a "taxpayer", an "individual", a "person", subject to taxation upon the net income at the rates and by the methods prescribed in those Sections. Otherwise there is no way of ascertaining from the Statutes either the subject-matter or the rate of taxation or of applying it to the party responsible for the payment. The Statute, of course, does not undertake to repeat, in connection with every different species of taxpayer, all of the provisions for computing and ascertaining the tax. To do this would make the Statute intolerably prolix and introduce further confusion into a subject which, as the voluminous litigation over income taxes shows, already presents many and serious difficulties.

At page 13 of the petitioner's brief in No. 225 and in the footnote attention is called to the fact that express provision was made in the Statute (Rev. Act 1921, Sec. 219 (d) etc. and Sec. 204 (c) etc.) for certain "deductions" by the beneficiary, and this is made the occasion for the application of the maxim, "Expressio unius est exclusio alterius." We think counsel overlooks the reason and mistakes the purport of these provisions. The provisions in Sec. 219 (d) etc. relates to the *apportionment* of *credits* under Sec. 216 (a) and (b) for normal tax purposes only. The provision in Sec. 204 (c) etc. relates to net losses of previous years. Under

the terms of Sec. 212 (a) defining "net income" and prescribing the method of ascertaining it only the deductions prescribed in Sec. 214 would be allowable. The allowances referred to in the brief are special allowances of a different character from those specified in Sec. 214 and are, for the most part, personal to the taxpayer, and, in the case of trusts, may require apportionment among several beneficiaries. The reason for these particular provisions is, therefore, apparent. They manifestly have no relation to the class of deductions in which depletion is included.

6 Returns made conformably to prescribed methods.

It is obvious that, in a technical sense, the royalties may be considered as gross income (1) of the trust, or (2) of the beneficiaries.

If the former view is to be taken the question of the allowance of depletion arises immediately upon the return of the trustees. Under Sec. 213 (Revenue Act of 1921, 42 Stat. 238) the trustees should return the gross sum received. Under Sec. 214 (a) they should deduct "a reasonable allowance for depletion" as was done in these cases. Under the same authority they should, in addition, deduct the amount distributable to the beneficiaries. (Sec. 219 supra). This also was done. The return as to the oil royalties was made upon the prescribed form of the Bureau of Internal Revenue, an outline of which appears on page 3 supra.

The beneficiaries also were required to make returns, and they did so, reporting receipts from the source indicated in the amount of the net income distributed to them, as shown by the fiduciary return. Should they also have included the sums deducted by the trustees for depletion?

It is to be remembered that the tax returns are returns of *income*. If the deduction made by the trustees was a proper and lawful one, it amounted, in substance, to a segregation of their receipts between income and capital. That is the evident purpose of the method prescribed for making the returns and the only purpose which can be attributed to the statutes allowing depletion deduction. Any other

view of the subject reduces the return to a mere form, without substantial significance.

If, then, the return of the trustees was properly made and the segregation between capital and income authorized, it seems to follow that the amount designated as "depletion" came to the beneficiaries as a distribution of capital—"the value of property acquired by bequest or devise", which is excluded from taxation by Sec. 213 (b) (3), (42 Stat. 238).

These amounts were not in any substantial sense "income" unless through some magic influence in passing from the hands of the trustees to those of the beneficiaries they were converted from bequest of capital to income.

7 Distributive shares means distributive incomes—not capital.

At page 15 of the brief it is suggested that:

> "The beneficiaries of the trust might receive distributions of proceeds of the sale of the property constituting the corpus of the trust, as well as distributions of income arising therefrom."

In that case we suppose such receipts would be considered a part of the beneficiary's "distributive share". And at page 13 of the same brief it is said that "the statute makes the beneficiary taxable on his distributive share and on all of his distributive share." Share of what? Is the Court to be precluded from looking to the origin and nature of the distributive share to determine whether it is capital or income, or must the taxpayer, merely because he happens to be a beneficiary of a trust, be taxed under the guise of "income" upon all of the proceeds?

Let us illustrate the point further by supposing that the trustees had sold and disposed of the entire residuary estate leaving in their hands the price to be distributed in pursuance to the will. Under all of the Revenue Acts the capital value at the time the will became effective would be taken as the cost of the property and would be deductible from the proceeds before it could be determined whether any gain had

been realized or not. Yet the proceeds in such case would have been as much "the distributive shares" of the beneficiaries as in the case of income distributed from royalties. It appears to us that this illustration demonstrates the error involved throughout the petitioner's brief in using the term "distributive share" in lieu of the term "income."

8 Only possible allocation of depletion is to these taxpayers.

With noteworthy generosity the Government seems to concede, for the purposes of this case, that the depletion deduction may be made by the trustees as distinguished from the beneficiary. This concession is not so surprising since the result would be, if the contention of the petitioner is carried to its conclusion, that no effective deduction could be made by anybody. As the supplemental statement supra shows, the deduction was made by the trustees in the returns actually filed. It is insisted, however, that when the proceeds reached the hands of the beneficiary the trustees' deduction must be nullified and the amount restored as taxable income without any right on the part of the beneficiary to take the allowance.

It may be that the contention would not be carried to the extreme point that where two beneficiaries were concerned, one having a life interest and the other a remainder, the remainderman would be obligated to treat the depletion reserve as income without benefit of deduction. But if the deduction were conceded in such case, there seems to be no reason in principle why it should not be conceded where there is but one interest for life and remainder merged in a single individual. No logical reason is suggested why different principles should apply in the different circumstances illustrated.

At page 17 of the petitioner's brief the contention seems to be made that Congress, in the Revenue Act of 1928, sanctioned the interpretation of previous Revenue Acts which is now asserted on the part of the Government.

In the Revenue Act of 1928 (Sec. 23 (1)), the provision of the Revenue Act of 1921 (Sec. 214, (a) (10)) for depletion deduction, was reenacted with the addition of a provision for allocating the deduction (a) as between life tenant and remainderman, and (b) between trustee and beneficiary, in the former instance allocating the deduction to the life tenant and in the latter authorizing apportionment between trustee and beneficiary:

> "In accordance with the pertinent provisions of the instrument creating the trust, or in the absence of such provisions on the basis of the trust income allocable to each." (45 Stat. 800)

In other words, the deduction was neither granted nor withheld, increased nor diminished, by the later Act. A specific rule of apportionment was provided. As between the life tenant and the remainderman, it perhaps favored the former as against the latter, as compared with the rule which had been adopted by the courts. As between the trustee and the beneficiary it established an explicit rule, where formerly the rule had been implicit.

It seems to us a natural and reasonable conclusion, from this examination of the statutes, that the purpose and scope of the legislation as a whole is to tax only net income, irrespective of the incidence of the tax as between the particular taxpayers, and that the provisions, both inclusive and exclusive, are formed with the purpose of ascertaining that residuum; that the tax is then laid upon the residuum and apportioned, as equitably and appropriately as may be, among the taxpayers by whom the income is received and enjoyed; that beneficiaries of a trust, as they are held to all of the responsibilities and obligations of other individual taxpayers, are entitled to the corresponding rights and benefits of the methods established for a uniform and equitable distribution of the tax burden; and that the admitted depletion in this case in the process of realizing the value of the mineral resources should be allowed as a deduction, either upon the returns of the trustees or those of the taxpayers—the only possible allocation in the circumstances shown.

9 The only pertinent cases support respondents' claims.

While these conclusions have been reached without special reference to the authority of decided cases, it is believed that they are fully sustained by a substantial unanimity of the decisions applicable to the conditions and circumstances shown in this case. We believe no instance is to be found where depletion has not ultimately been allowed as a deduction to taxpayers who sustained similar relations to the trust fund to those occupied by the taxpayers in this case. There are, to be sure, cases in which deductions by the beneficiaries have been disallowed but they are cases broadly distinguishable from the case at bar and fall generally into two classes:

1. Cases in which the deductions claimed were essentially different in their nature from deductions for depletion.

2. Cases in which, by reason of distinct beneficial interests or estates, deductions have been denied in favor of one class as against other classes of beneficiaries.

10 Essential differences between classes of deductions.

It may be useful here to point out some of the distinctions between the different classes of deductions allowed. These distinctions are believed to be inherent in the nature and subject-matter of the deductions and the grounds on which they rest.

In dealing with the general subject of deductions throughout the petitioner's brief no distinction is made between deductions for depletion, depreciation, operating losses, capital losses, etc. Yet there are manifest differences of a fundamental nature, so far as the allowance is concerned.

Depletion is a wasting process, inseparably linked with the production, from which the income is derived. The exhaustion of the substance is inherent in the very process. The substance is disposed of and paid for and the price included in the proceeds.

Depreciation may or may not arise in the process. It may wholly or partly result from mere lapse of time. It may relate to wholly different property or assets. It may be proportioned or disproportioned to the substance removed. Its association with depletion, production or operation is merely casual.

Operating losses bear no direct relation to depletion. They may bear no relation whatever to it. Ordinarily they are personal to the operator and dependent upon his skill, diligence, good or bad fortune, or other extraneous conditions.

Capital losses are ordinarily not associated at all with the operation of production. They usually arise upon sale but may be the result of other causes adventitious to or wholly independent of the productive enterprise.

11 Cases involving depletion deductions.

A reference to the several cases which have been before this Court under the Revenue Acts since the Sixteenth Amendment will disclose that the government has steadily resisted the application of those provisions of the Statutes which were deemed advantageous to the taxpayer in determing his taxable income and has insisted upon a strict limitation of allowances for depletion, as well as other deductions, to cases where the Statutes are so specific that the matter does not admit of debate.

A leading case on this subject is Lynch v. Alworth-Stephens Co., 267 U. S. 364, where depletion deduction was claimed by the lessee of a mine who had sublet upon terms of over-riding royalty. That case is cited by the petitioner here in an effort to distinguish the position of the intermediate lessee from that of the beneficiary of the trust involved in the present cases.

It is not, however, merely the language of the Opinion in that case which is significant but the fully reasoned application of the Statutes to a situation which, in its essenti-

als, is comparable with the situation of the present respondents. The court said:

> "There is nothing to suggest that the word 'property' is used in any restricted sense. In the case of mines, a specific kind of property, the exhaustion is described as depletion, and is limited to an amount not exceeding the market value in the mine of the product mined and sold during the year. The interest of respondent under its leases in the mines being property, its right to deduct a reasonable allowance for exhaustion of such property, if there be any, during the taxable year, results from the plain terms of the statute, * * *. We agree with the Circuit Court of Appeals that 'the plain, clear, and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone whose property right and interest therein have been depleted by the extraction and disposition of the product thereof which has been mined and sold during the year for which the return and computation are made.' And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.
>
> "It is said that the depletion allowance applies to the physical exhaustion of the ore deposits, and since the title thereto is in the lessor, he alone is entitled to make the deduction. But the fallacy in the syllogism is plain. The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened. There is an exhaustion of property in the one case as in the other; and

the extent of it, with the consequent deduction to be made, in each case, is to be arrived at in the same way."

The latest case which has come to our notice is Palmer v. Bender, 287 U. S. 551, involving a somewhat similar transaction. In that case a partnership, of which the taxpayer was a member, owned an oil lease in Louisana, and transferred the leased premises to an operating company, reserving a proportion of the oil to be produced. The taxpayer claimed a depletion allowance of his share of the proceeds of oil produced. This Court sustained his contention, saying, inter-alia:

"It has been elaborately argued at the bar and in the briefs whether under Louisiana law the two instruments (involved in the transaction) are assignments or subleases. We do not think the distinction material. * * * It will be observed that the statute directs that reasonable allowance for depletion be made as a deduction in computing net taxable income, 'in the case of oil and gas wells, * * * according to the peculiar conditions in each case.' The allowance to the taxpayer is not restricted by the words of the statute to cases of any particular class or to any special form of legal interest in the oil well. It is true that under Article 215 of Treasury Regulations 62 the lessor of an oil or gas well is entitled to a depletion allowance upon the bonus and royalties received from the lessee. See Murphy Oil Co. v. Burnet, 287 U. S. 299, ante, 318, 53 S. Ct. 161, supra. But there is nothing in the statute or regulations which confines depletion allowances to those who are technically lessors. The concluding sentence of the section that 'In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and the lessee' presupposes that the deductions may be allowed in other cases. The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the ex-

traction of the oil, to which he must look for a return of his capital."

The Court referred to Lynch v. Alworth-Stephens Co., supra, saying:

> "The statute made no specific reference to lessees and the Government argued that as the lessee acquired no ownership of the ore until the severance from the soil * * * the lease gave him no depletable interest in the ore in place. But this Court held that regardless of the technical ownership of the ore before severance, the taxpayer, by his lease, had acquired legal control of a valuable economic interest in the ore capable of realization as gross income by the exercise of his mining rights under the lease. Depletion was, therefore, allowed."

Continuing, in the Palmer case, the Court said:

> "Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough, if by virtue of the leasing transaction, he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. * * *
>
> "In the present case the two partnerships acquired, by the leases to them, complete legal control of the oil in place. Even though legal ownership of it, in a technical sense, remained in their lessor, they, as lessees, nevertheless acquired an economic interest in it which represented their capital investment and was subject to depletion under the statute. Lynch v. Alworth-Stephens Co. 267 U. S. 364, 69 L. ed. 660, 45 S. Ct. 273, supra. When the two lessees transferred their operating rights to the two oil companies, whether they became technical sub-

lessors or not, they retained, by their stipulations for royalties, an economic interest in the oil, in place, identical with that of a lessor, Burnet v. Harmel, and Bankers Pocahontas Coal Co. v. Burnet, supra. Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case."[1]

12 Allowances "according to particular conditions in each case."

The Court seems, in the Palmer case, to have noted the provision in the Statute for the allowance of a depletion deduction "according to the peculiar conditions in each case"; and, we think, this phrase ought to be accorded its meed of significance in applying the provision to any case. The import of the Statutes seems to be plain that a variety of conditions was in the legislative mind. Trusts, like leases, have been so very numerous and common in transactions of this kind, and this fact has been of such wide spread general knowledge, that such interests must be deemed to have been included in the purview of Congress. The provision has been reenacted in successive Revenue Acts over a period of years when cases of this character have been before the Courts.

[1]Whatever is said in this and other cases concerning ownership or other interests in oil or gas must, of course, be taken with reference to the qualified sense in which property interests in those fugitive substances are to be understood. Brown v. Spilman, 155 U. S. 665, Ohio Oil Co. v. Indiana, 177 U. S. 190.

Doubtless the only reason why the provision was not made more specific and detailed at the outset was the fear that any attempt of this kind would be more likely to defeat than to promote the purpose in view, by narrowing the scope of the Statutes to the specifications.

If it be contended, as the petitioner's brief imports, that a beneficial interest in an active trust is beyond the pale of this legislation, reference may profitably be made to other cases.

13 Property interests include equitable interests.

This Court has expressed what we believe to be the general doctrine, that such interests are property, whether considered as direct equitable interests in the corpus or as interests only in the income of the corpus, to the extent of the terms of the grant. In the case of Bryan v. Kennett, 113 U. S. 179, the Court, speaking of the relationship sustained by the United States as trustee for the inhabitants of the Territory of Louisiana and of the interest of the inhabitants due to such relationship, said:

> "The term 'property' as applied to lands, comprehends every species of title, inchoate or complete,"

and approved a statement in a previous decision that:

> "This court has defined property to be any right, legal or equitable, inceptive, inchoate or perfect, which before the treaty with France in 1803 * * * had so attached to any piece or tract of land, great or small as to affect the conscience of the former sovereign 'with a trust' and make him a trustee. * * * By the term 'property' applied to lands all titles are embraced, legal or equitable, perfect or imperfect."

As was said in Lynch v. Alworth-Stephens Co., supra:

> "There is nothing (in the Revenue Acts) to suggest that the word 'property' is used in any restricted sense. * * * The plain, clear and reasonable meaning of the statutes seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone

whose property right and interest therein have been depleted by the extraction and disposition of the product." In Irwin v. Gavit, 268 U. S. 161, 167, the Court said:

> "A gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund. Apart from technicalities, we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it."

14 Income of trustees is income of beneficiaries.

This was said in connection with a discussion by the Court as to whether the character of the proceeds was changed in passing from the hands of the trustees to that of the beneficiaries:

> "The money was income in the hands of the trustees, and we know of nothing in the law that prevented its being paid and received as income by the donee."

In other words, as we have already suggested, supra p. 14, the character of the receipts as income, and, as we believe, the method of determining income, are not changed or affected by the character of the interest or the relation of the recipient as trustee or beneficiary. These are to be determined impersonally from the nature of the fund itself, rather than by the technical trust relations.

An illustration of the view which this Court takes concerning the importance of the technical relations with which a trust fund may be surrounded is found in Lederer v. Stockton, 260 U. S. 1, where a trustee holding a fund, the ultimate beneficiary of which was a charitable corporation, was precluded, by technical reasons, from paying the income directly to such beneficiary. To avoid this difficulty the trustee loaned the fund to the beneficiary and the Government sought to collect a tax from the trust on the income. The Court said:

> "To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income [to avoid the exemption], would be to defeat the beneficient purpose of Congress."

The Courts of at least three of the Circuits have specifically upheld the right of the beneficiary of a trust entitled to receive the income and to share in some form in the corpus of the trust to take deduction allowance for depletion.

Second Circuit:

Merle-Smith v. Commissioner, 42 Fed. (2d) 837, Certiorari denied 282 U. S. 897

Seventh Circuit:

Falk v. Com., 64 Fed. (2d) 171

Tenth Circuit:

Com v. Molter, 60 Fed. (2nd) 498
Cooper v. Reynolds, 60 Fed. (2d) 650
Reynolds v. Cooper, 64 Fed. (2d) 644

An illustration of the application of the depletion allowance "according to the peculiar conditions in each case" is found in Signal Gasoline Corporation v. Com., 66 Fed. (2d) 886, (9 C.C.A.) which the taxpayer had casing-head gas contracts with several oil producing companies and claimed depletion deduction on the capital value of his rights under the contracts.

The decision of this Court in Palmer v. Bender, supra, was applied and the deduction allowed, the Court saying:

> "The right to a depletion allowance does not depend upon the nature or character of the legal estate retained or acquired by the parties to an original oil and gas lease or their successors, but depends entirely upon whether any such parties are entitled to share in the oil and gas produced from the properties. If any of such parties are entitled to a share of the oil and gas, he had the 'economic interest' upon which the Supreme Court bases the right to a depletion allowance."

In recent cases the Board of Tax Appeals follows the same rule.

Alphin v. Com., 21 B. T. A. 1101
Kuhn v. Com., 24 B. T. A. 216

The Bureau of Internal Revenue seems now to recognize the same rule.

C. B. X-2, 353 (G. C. M. 9804)
C. B. XI-1, 161, 169 (G. C. M. 10,273)

15 No authority for denial of depletion in instant cases.

We do not know of any authority, at least among recent cases, dealing with the subject of depletion, which conflicts with the rule established by the cases above cited. The leading citation in the petitioner's brief is that of Baltzell v. Mitchell, 3 Fed. (2d) 428, Certiorari denied 268 U. S. 690. It was a case involving a capital loss and the taxpayer's claim was denied on the ground that the beneficiaries of the trust had only a life interest in the fund and were, therefore, not interested in capital gains or losses, although one of the beneficiaries had a "vested, equitable remainder" in the estates; which is substantially in accord with the decision reached by this Court in Anderson v. Wilson, infra.

Similar results were reached under slightly varying conditions in other cases cited by the petitioner.

The case of Anderson v. Wilson, 289 U. S. 20, which petitioner's counsel seem to regard as pertinent to the present cases, involved a claim of the taxpayer in his return to deduct a share of the loss realized on the sale of a building constituting part of the residuary estate of his father. The Courts decided that the residuary estate was held in trust. The facts, as gathered from the three Reports (51 F. (2d) 268, 60 F. (2d) 52, and 289 U. S. 20) and from the briefs of counsel, were substantially as follows:

Out of a large estate $2,500,000 was given to a separate trustee; and the executors were directed to hold and manage the residue of the properties until, in their judgment, they could be advantageously disposed of but not beyond the lives of his sons; and, at discretion, to sell and dispose of them or incorporate the holdings, retaining or distributing the proceeds, in whole or in part, at discreation; and meanwhile to

pay over the net income semi-annually to the residuary devisees.

The special trust fund of $2,500,000 was divided by the will into five equal parts, of one of which the taxpayer was beneficiary. The proceeds of the residuary estate also were divided into five equal parts, one of which, to the amount of $500,000, was set aside, and added to his share of the trust fund, and was to be held for his use during life, with remainder to lineal descendants, etc. The balance of such one-fifth part was given to the taxpayer absolutely.

Prior to the taxable year (1922) the debts had been paid and all of the estate had been distributed except properties valued at about $350,000. In that year the building was sold for $165,000, $50,000 of which was distributed and the balance retained by the executors. The sale involved a loss of $113,000, one-fifth of which was claimed by the taxpayer as his share of a deduction from income. The taxpayer's share of the proceeds of the sale of the building was, of course, not taxed; so that the deduction claimed did not come out of the proceeds but was claimed as an offset or deduction from his share of the income proper of the estate. This Court held that the residuary bequest was a trust held by the executors in fee and that the loss was attributable to the trust and not to the taxpayer as a beneficiary, saying:

> "Whether the result would be the same if the beneficiaries had been the owners of future estates in remainder we are not required to determine. * * Our ruling will be kept within the limits of the case before us."

As we understand it, the distinguishing features of the case resided chiefly in the fact that the executors (trustees) still retained the title, custody and management of the estate which they were engaged in managing and liquidating and retained in their hands $115,000 of the proceeds of the sale, together with the properties still undisposed of. There was still outstanding the remainder interest in the trusts, aggregating $1,000,000, of which the taxpayer was the life beneficiary, such remainder interest intervening between the taxpayer's life use and his ultimate interest in the estate. The

loss on the sale was wholly unconnected with the taxpayer's income and even if it formed a part of the capital of the trust in which he was interested he was protected from indirect loss by the preference to the extent of $500,000 given to his life use. Elsewhere in this brief we have attempted to point out some further essential differences between a depletion deduction and a loss deduction. An additional distinction arises from the character of the trust involved in the present cases, which is discussed infra.

The Circuit Court of Appeals in its Opinion in the present cases (64 F. (2) 644) reviewed the authorities cited, and we think distinguished them with care. It had the benefit of the Opinions of this Court in Anderson v. Wilson and Palmer v. Bender, supra, and pointed out the essential difference between a capital loss and depletion, and the comprehensive nature of the interest of the beneficiaries in the present cases. It apprehended clearly the point involved that there was a question not of apportioning the depletion between a trust and the beneficiaries but of allowing any depletion to anybody. We believe that its analysis of the Statutes and its interpretation of the cases was comprehensive and exhaustive and that it reached a correct result.

The point suggested at the threshold of this brief that the contention of the Government if applied to the present case would inevitably result in the disallowance of any depletion to anybody, although the fact and the amount of the actual wastage is admitted, ought not to be lost sight of in the consideration of the cases.

In every other case, we believe, where a deduction from income has been involved the decision of the case has resulted in the allowance to somebody. In cases where the interests of life beneficiaries and remaindermen have been involved, the depletion, where disallowed to the life beneficiary, has been allowed to the trust. The result of this has been that the remainderman ultimately realized the benefit of the deduction. In cases where the life tenant has been the ultimate remainderman he, himself, has realized the ultimate benefit. In other words, what has been taken out of one pocket has been put in the other or in the pocket of another. We be-

lieve there is no case to be found where the benefit of the deduction has been wholly denied.

It is manifest that in the circumstances of the present case there is but one place where the deduction may be made in order to be effective, viz, in determining the net income of the taxpayer beneficiary. It matters not in what particular form the allowance is made or whether it be taken out of the gross income returned by the fiduciaries or out of the receipts treated as gross income in the return of the beneficiary. The result would be precisely the same, to recognize the allowance as one sanctioned by the Statutes the benefit of which must accrue to the respondent.

16 Trust was executed under Statute of Uses.

In all that has been said the subject has been dealt with as though the taxpayer had no right in the fund from which the income proceeds, except the equitable right to participate in distributions of proceeds by trustees holding the legal estate. The facts shown by the supplemental statement, however, put the taxpayer's interest in a different light. (Supra pp. 2-4).

The trustees under the will were given power to sell, call in, collect and convert the properties of the estate into money. The purpose of this power is obvious from a consideration of the scope and provisions of the will. A considerable sum, amounting perhaps to $200,000, was required to be raised out of the assets to take care of preferred testamentary dispositions. That the testator expected the money to come from his oil rights is clear from a reference to the will and codicil. The authority to convert the properties into money is, we think, plainly referred to the need of raising the funds to satisfy the prior bequests. This need, as is shown by the Stipulation of Facts, (R. 37), had been met and the purpose of the authority to convert the properties had, thus, been satisfied prior to the beginning of the taxable periods involved in the present case. During the taxable periods the trustees performed no function except to receive the payments of royalty, to pay the taxes and expenses of the

trust, to pass the residue on to the taxpayers whose interest in the entire residuary estate had become complete and absolute. As the Trial Court said (60 Fed. (2d) 652):

> "The provisions of the will concerning the trust features construed as free from legal technicality, amount to the mere passing of the income accruing from the royalties through the trust to the beneficiaries and, therefore, in substance, the situation is the same as though the beneficiaries were receiving such royalties direct."

In the circumstances shown the trust had thus become fully executed under the Statute of Uses[1]. The legal, as well as the equitable title, was vested in the beneficiaries. There was in effect no trust in existence.

In Young v. Bradley, 101 U. S. 782, where a testamentary trust had been created giving the trustees "the largest powers and discretion in taking charge of and managing" the estate, and authorizing them "to have, hold, direct and control", according to their best judgment, and "to sell and dispose of the same, or any parts thereof, from time to time, subject only to the aforesaid (preferred) trusts" as freely as the testator could do if living, etc., the Court, reciting the events which had happened, including a conveyance by the trustee which was held to be without authority, said:

> "The things to be done by the trustees were defined, and in the nature of things were to have an end. * * * These are all the trusts declared by the will. They were

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[1]R. S. Wyo. 1931, Ch. 26-101, provides that:

"The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable, and all declaratory or remedial acts or statutes made in aid of, or to supply the defects of the common law prior to the fourth year of James the first (excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth and ninth chapter of thirty-seventh Henry Eighth) and which are of a general nature and not local to England, shall be the rule of decision in this state when not inconsistent with the laws thereof, and shall be considered as of full force, until repealed by legislative authority."

The State has no further Statutes affecting the subject. The law of New York on the subject is specially regulated by legislation, superseding the Statute of Uses, enacted early in the 19th Century, which has been substantially followed in Michigan, Wisconsin, Minnesota, California and Dakota. 2 Pom. Eq. Jur. 1003.

all performed, superseded or terminated before the deed to Young was made. The trustee in making that deed was discharging no trust reposed in him and no duty required of him by the will. It is not suggested anywhere that any such purpose was in view. It is said that the property was dilapidated and needed repair. But as it belonged to Mrs. Bradley and her children, and as the will did not confer on the trustees any guardianship or control over the property of Bradley's children after their share was allotted to them, the trustees had no power over it when it came to them by the other provisions of the will on the death of the other devisees.

"The doctrine is well settled that, whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirement of the trust. If that requires a fee simple estate in the trustee, it will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate either in quantity or duration, only the latter will vest."

To similar effect see:

Carwardine v. Carwardine, 1 Eden 27, 28, Eng. Rep. 594, 597

Doe v. Simpson, 8 De G. M. and G. 521, 102 Eng. Rep. 1031

Morrant v. Gough, 1 Man. & Ry. 41, 108 Eng. Rep. 700, 702

In an earlier part of this brief (supra p. 13) we have called attention to some of the expressions in the Opinions of this Court concerning the nature of equitable rights as property. The principle there referred to may be carried somewhat further in this connection. In Croxall v. Sherrerd, 5 Wall. 268, the Court said:

"In the law, if real property, the principles which apply to estates of both kinds, (legal and equitable), with a few limited exceptions not affecting this case,

are the same. In the consideration of a court of equity the cestui que trust is actually seized of the freehold. He may alien it and any legal conveyance by him will have the same operation in equity upon the trust as it would have had in law upon the legal estate. * * * The trust, like the legal estate, is descendible, devisable, alienable and barrable by the act of the parties and by matter of record. Generally whatever is true at law of the legal estate is true in equity of the trust estate."

See also:

Town of Cascade v. Cascade County, 75 Mont. 304
Cushing v. Blake, 30 N. J. Eq. 689, 695
Zelley v. Zelley, ...N. J. Eq.....136 A. 738
Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186

For the reasons set forth, it is submitted that the decisions of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

Nos. 227, 228, 229.—October Term, 1933.

Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Petitioner,
227 *vs.*
Richard F. Cooper.

Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Petitioner,
228 *vs.*
Barbara V. Cooper.

Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Petitioner,
229 *vs.*
Richard F. Cooper and Barbara V. Cooper.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[January 15, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

In each of these causes a beneficiary received from trustees royalties arising from a lease of oil and gas lands in Wyoming. Taxes were exacted upon the full amounts so received. Separate suits were brought to recover proper allowances for depletion. The respondents prevailed in both of the courts below. Here the causes were heard together.

The Solicitor General says—"The question is identical with that raised in *Helvering* v. *Falk*, No. 225, October Term, 1933, and the argument made in the Government's brief in that case is likewise applicable here. . . . There is therefore substantially

no difference between the position of the beneficiaries in this case and the *Falk* case."

The judgments below are affirmed upon authority of *Helvering* v. *Falk*, decided this day.

Mr. Justice BRANDEIS, Mr. Justice STONE, and Mr. Justice CARDOZO think that these cases are to be distinguished from No. 225, *Helvering* v. *Falk*, just decided, because of the nature of the duties imposed upon the trustees, and of the remainder interest granted to the beneficiaries by the trust instrument presently involved, and accordingly concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.